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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARP; JACK W. MACMILLAN; FRANK H. SMITH, JR., FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,
Petitioners,
v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition concerns a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) that allows employers to terminate the health care benefits of some ten million retired workers at age 65 and older. However, as acknowledged by the EEOC, Congress expressly prohibited this very practice in the substantive prohibitions of the Age Discrimination in Employment Act (ADEA) while creating a narrow exception for age-based differences in benefits when justified by cost considerations. The question presented in this Petition is therefore:

Whether the Equal Employment Opportunity Commission's rulemaking authority under the Age Discrimination in Employment Act (ADEA) empowers it to overrule unambiguously expressed congressional intent, contrary to the application of *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984) in every other circuit, and legalize a form of arbitrary age discrimination that Congress directly addressed and plainly prohibited in the substance of the ADEA?

LIST OF PARTIES

Petitioners are AARP; Jack W. MacMillan; Frank H. Smith, Jr.; Frank A. Wheeler; Fred Dochat; Gerald Fowler ; and M. Elaine Clay. Respondent is the Equal Employment Opportunity Commission (EEOC).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CORPORATE DISCLOSURE STATEMENT 1

OPINIONS BELOW 1

STATEMENT OF JURISDICITON 1

RELEVANT CONSTITUTIONAL PROVISION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING THE PRINCIPLES GOVERNING REVIEW OF AGENCY RULEMAKING SET FORTH IN THIS COURT'S DECISION IN *CHEVRON, U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL* AND THE REVIEW STANDARDS OF SECTION 706 OF THE APA 11

A. The Third Circuit's Decision Conflicts with This Court's *Chevron* Jurisprudence And The Proper Application of *Chevron* In Every Other Circuit 11

B. The Approach By The Third Circuit To The "Not in Accordance With Law" Standard of Section 706(2)(A) of the Administrative Procedure Act Presents A Conflict Among the Circuits 21

II. THE COURT SHOULD GRANT REVIEW BECAUSE PERMITTING EEOC REGULATIONS TO OVERRULE THE ADEA'S PLAIN STATUTORY LANGUAGE VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE 24

CONCLUSION 30

APPENDIX

Third Circuit Opinion 1-A

District Court Opinion 17-A

District Court Initial Opinion 61-A

Third Circuit Opinion Denying Rehearing En Banc 76-A

Statutory Text 78-A

TABLE OF AUTHORITIES

CASES

AARP v. Equal Employment Opportunity Commission, 383 F. Supp.2d 705 (E.D. Pa. 2005) 1,5,6,7,8,16,25

AARP v. Equal Employment Opportunity Commission, 390 F. Supp. 2d 437 (E.D.Pa.2005) .. 1,7,8,16

AARP v. Equal Employment Opportunity Commission, 489 F.3d 558 (3d Cir. 2007) ..... *passim*

Baptist Health v. Thompson, 458 F.3d 768 (8th Cir. 2006) 15

Castro v. Chicago House Auth., 360 F.3d 721 (7th Cir. 2004) 15

Chevron U.S.A., Inc. v. Nat' l Res. Def., Council Inc., 467 U.S. 837 (1984) .... *passim*

Clinton v. City of New York, 524 U.S. 417 (1998) 26

Diersen v. Chicago Car Exch., 110 F.3d 481 (7th Cir. 1997) 18,19,20,29

Dominion Energy Brayton, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006) 15

EEOC v. Seafarers Int'l Union, 394 F.3d 197 (4th Cir. 2005) 15

Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075 (D.C. Cir. 1996) 20

Erie County Retirees Ass'n v. County of Erie,
220 F.3d 193 (3d Cir. 2000) 5,6,7,8,25

Fed. Election Comm'n v. Democratic Senatorial Campaign Comm'n,
454 U.S. 27 (1981) 28

Field v. Clark, 143 U.S. 649 (1892) 27

Gerber v. Norton, 294 F.3d 173(D.C. Cir. 2002) .. 23

Global Crossing Telecomms., Inc. v. Metrophones Telecomms.,
127 S. Ct. 1513 (2007) 12

Hackworth v. Progressive Cas. Ins. Co.,
468 F.3d 722 (10th Cir. 2006) 16

Harris v. Olszewskj,
442 F.3d 456 (6th Cir. 2006) 15

Indus. Union Dept., AFL-CIO v. American Petroleum Inst.,
448 U.S. 607 (1980) 27

INS v. Chadha, 462 U.S. 919 (1983) 26

Long Island Care at Home, Ltd. v. Coke
127 S. Ct. 2339 (2007) 14

Mercy Catholic Med. Ctr. v. Thompson,
380 F.3d 142 (3d Cir. 2004) 24

Mizrahi v. Gonzales, 492 F.3d 156
(2d Cir. 2007) 15

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 21

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) 13

Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 7,8,12,13,14

Natural Res. Def. Council v. EPA, 489 F.3d 1364 (D.C. Cir. 2007) 14

New Edge Network, Inc. v. FCC, 461 F.3d 1105 (9th Cir. 2006) 15

Orca Bay Seafoods v. Nw. Truck Sales, Inc., 32 F.3d 433 (9th Cir. 1994) ... 18,19,20,29,30

Public Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989) 21

Santa Fe Snyder Corp. v. Norton, 385 F.3d 884 (5th Cir. 2004) 15

Schiller v. Tower Semiconductor Ltd., 449 F.3d 286 (2d Cir. 2006) 16,17

Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638 (9th Cir. 2007) 22,23

State of New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) 19,20,29

Turtle Island Restoration v. Nat'l Marine Fisheries Serv., 340 F.3d 969 (9th Cir. 2003) 23

United States v. Geyler, 949 F.2d 280 (9th Cir. 1991) 19

United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 27

United States v. Mead Corp., 533 U.S. 218 (2001) 13

Whitman v. Am. Trucking Ass'n,
531 U.S. 457 (2001) 27

Wilderness Watch v. Mainella,
375 F.3d 1085 (11th Cir. 2004) 16

STATUTES

Administrative Procedure Act (APA),
5 U.S.C. § 551, *et seq* 5
5 U.S.C. § 706 11,21,22,23,24,27
5 U.S.C. § 706(2)(A) 9,10,21,22,23,24
5 U.S.C. § 706(2)(D) 23

Age Discrimination Employment Act of 1967 (ADEA),
29 U.S.C. § 621 *et seq* 2
29 U.S.C. § 623(a)(1) 2
29 U.S.C. § 623(f)(2)(B)(i) 2,3,17,25
29 U.S.C. § 623(f)(2)(B)(ii) 17
29 U.S.C. § 623(g) 3
29 U.S.C. § 623(l)(1)(B) 17
29 U.S.C. § 628 ..... *passim*
29 U.S.C. § 630(l) 2,3

Medicare Prescription Drug, Improvement
and Modernization Act of 2003,
Pub. L. No. 108-173,
117 Stat. 2066 (2003) 30

Older Workers Benefit Protection Act
of 1990 (OWBPA),
Pub. L. No. 101-433,
104 Stat. 978 (1990) 2,17,21,26,28

Pub. L. No. 101-239, Title VI, § 6202(b)(2)(C)(1),
103 Stat. 2233 (1989) 3

28 U.S.C. § 1254(1) 1

U.S. Const., Art. I 26
U.S. Const., Art. I, § 1 1,25

U.S. Const., Art. I, § 7 26

REGULATIONS

29 C.F.R. § 1625.10 3,25
29 C.F.R. § 1625.10(e) 2,3
29 C.F.R. § 1625.10(f)(1)(ii) 3
29 C.F.R. § 1625.10(f)(1)(ii)(c) 4
29 C.F.R. § 1627.15(b) 28

53 Fed. Reg. 5971 (Feb. 29, 1988) 3
68 Fed. Reg. 41542 (July 14, 2003) 4,6,29

MISCELLANEOUS

EEOC Final Rule on ADEA Exemption for Retiree Health Benefits,
Daily Lab. Rep. (BNA) No. 78
(April 23, 2004) 4,5

http://www.eric.org/forms/uploadFiles/
2D5600000002.filename.Erie_Conferee_letter
_Grassley_Thomas_Sept03.pdf 30

Medicare Drug Deal Would Exclude Employers' Subsidies From Taxes,
Daily Lab. Rep. (BNA) No. 222, at A-7
(Nov. 18, 2003) 30

U.S. General Accounting Office, "Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable To Further Erosion,"
GAO Doc. No. GOA-01-347 (May 2001) 5

CORPORATE DISCLOSURE STATEMENT

Petitioner AARP is a nonprofit, nonpartisan membership organization of individuals age 50 and older. AARP is not a publicly traded corporation, and has no parent or subsidiary corporations which are publicly traded. Petitioners MacMillan, Smith, Wheeler, Dochat, Fowler and Clay are retired individuals over age 65, who are also members of AARP.

OPINIONS BELOW

The opinion of the United States Court Of Appeals for the Third Circuit (Pet. App. 1-A - 16-A), is published at 489 F.3d 558. The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 17-A - 60-A) is published at 390 F. Supp. 2d 437. A prior decision of the district court (Pet. App. 61-A -75-A) is published at 383 F. Supp. 2d 705.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. Pet. App. 1-A. The court denied a timely petition for rehearing en banc on August 21, 2007. Pet. App. 76-A - 77-A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art., Sec. 1.

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Age Discrimination in Employment Act, 29 U.S.C.

§§ 623(a)(1), 623(f)(2)(B)(i), 628 and 630(l) are reproduced in the appendix to this petition. Pet. App. 78-A - 79-A. The text of 29 C.F.R. § 1625.10(e) is also reproduced in the appendix. Pet. App. 79-A.

STATEMENT OF THE CASE

This case asks whether an executive agency may issue an administrative rule that undisputedly overrules clear statutory provisions enacted by Congress. The specific issue before the Court is the legality of a regulation adopted by the Equal Employment Opportunity Commission (EEOC) that permits employers covered by the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*, to discriminate based on age by reducing, or eliminating altogether, health care benefits for retirees age 65 or older while providing these benefits to younger retirees.

At all times throughout the litigation, the parties have agreed that Congress' prohibition of arbitrary age discrimination in employee benefits was clearly and plainly expressed in the provisions of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). Congress' articulated purpose behind the passage of the OWBPA was "to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.*) which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub. L. 101-433 , Title I, § 101 (Oct. 16, 1990; 104 Stat. 978).

Congress amended the prohibitions of section 11(l) of the ADEA, 29 U.S.C. 630(l), to make it unmistakably clear that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such

benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l). And, critically relevant to the issues here, Congress expressly amended the existing exception for employee benefit plans, and replaced it with the plain language of the "equal benefit or equal cost" rule that had been set forth in administrative regulations since 1969. The statutory incorporation of the "equal benefit or equal cost" rule created an exception to the prohibition on age discrimination by allowing employers to comply with the ADEA either by providing equal benefits, or by incurring equal costs for benefits, on behalf of both younger and older employees. In making its intent crystal clear, Congress went so far as to literally incorporate into the ADEA the extensive administrative regulations that, for more than a decade, governed the application of the "equal benefit or equal cost" exception. *See* 29 U.S.C. §623(f)(2)(B)(i) (statutory exception allowing employers to observe the "equal benefit or equal cost" rule "as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989);. . . ." In determining whether "equal benefits" were being provided, the regulation allowed employers credit for those benefits provided by Medicare. 29 C.F.R. § 1625.10(e)(1989). Consequently, employers could satisfy their ADEA obligations by purchasing either "carve out" or "supplemental" plans, both of which are considerably less expensive than the cost of full health care coverage for younger individuals. *Id.* at 29 C.F.R. §1625.10(f)(1)(ii)(1987).[1/] Precisely because health care benefits for individuals age 65 and older were less

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[1/] The EEOC removed this provision from its regulations because it was inconsistent with Section 4(g) of the ADEA, 29 U.S.C. § 623(g)(passed in 1984), which required employers to provide the same health care benefits to Medicare-eligible employees as are provided to younger individuals. 53 Fed. Reg. 5971 (Feb. 29, 1988). Section 4(g), however, was repealed in 1989. Pub. L. No. 101-239, Title VI,§ 6202(b)(2)(C)(i), 103 Stat. 2233 (1989).

expensive than benefits for their younger counterparts, the regulation ensured that employers would not be discouraged from hiring or retaining older employees because of the cost of their health care. 29 C.F.R. § 1625.10(f)(1)(ii)(c)(1987) ("As a result of the savings to employers when benefits are available through Medicare, reductions in total health care benefits for employees age 65 to 70 will generally not be justified").

On July 14, 2003, the EEOC published a Notice of Proposed Rulemaking in the Federal Register announcing the agency's intention to issue an "exemption" under section 9 of the ADEA, 29 U.S.C. § 628. That exemption would allow "employee benefit plans to lawfully provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits" or state-sponsored retiree health benefits. 68 Fed. Reg. 41542, 41547 (July 14, 2003). The EEOC's proposal would nullify the limited statutory exception enacted by Congress – the ADEA's "equal benefit or equal cost rule" - and would permit employers to cease altogether – without any cost justification – health care benefits for retirees age 65 and older, directly contrary to the prohibitions on discrimination set forth in the substance of the ADEA.

Despite vigorous objections by AARP and tens of thousands of affected individuals, the EEOC voted on April 22, 2004, to issue its proposed exemption in final form. The EEOC's rationale for the "exemption" rested on the premise that rather than comply with the "equal benefit or equal cost" exception crafted by Congress, "many employers would reduce the overall level of health benefits they offer to retirees or cease providing such benefits altogether, leaving many retirees without access to affordable health care coverage." *EEOC Final Rule on ADEA Exemption for Retiree Health Benefits*, Daily Lab. Rep. (BNA) No. 78, at E-1 (April 23, 2004). The rulemaking record reveals that the health care benefits of approximately ten

million individuals could be affected. *Id.* at n. 12 (citing to U.S. General Accounting Office, "Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable To Further Erosion," GAO Doc. No. GOA-01-347, at 1 (May 2001)).

The petitioners filed suit on February 4, 2005, in the U.S. District Court for the Eastern District of Pennsylvania seeking to enjoin the regulation which was to become effective upon publication. The petitioners' complaint alleged that the regulation was contrary to the ADEA, violated the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and violated the constitutional doctrine of separation of powers, as it had the effect of repealing a clear stautory provision of the ADEA.

On March 30, 2005, the district court issued a memorandum opinion and order granting summary judgment to the petitioners. *AARP v. Equal Employment Opportunity Commission*, 383 F. Supp.2d 705 (E.D. Pa. 2005). The district court premised its decision on the application of *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Applying *Chevron*'s "two-step approach to judicial review of agency interpretations of acts of Congress," the lower court appropriately held that first it "must determine whether Congress expressed a clear and unambiguous intent in the statute concerning the precise question at issue." *AARP v. EEOC*, 383 F.Supp.2d at 708. As the court correctly observed, it should proceed to the second step of the *Chevron* analysis only "'if the statute is silent or ambiguous with respect to the specific issues.'" *Id.* quoting *Chevron*, 467 U.S. at 843

In addressing the issue of congressional intent at step one of the *Chevron* analysis, the lower court deferred to the Third Circuit's holding in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). As the district court explained, "[b]ased upon a

detailed statutory analysis of the Act, the Third Circuit held that *it was clear from the face of the Act that Congress intended* for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare." 383 F.Supp. 2d at 707 (emphasis added). Throughout its opinion, the lower court emphasized that "the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue." *Id.* at 709; *See also id.* at 710 ("the Third Circuit held in *Erie County* that Congress intended the ADEA to apply to the exact same behavior that the EEOC would exempt"); *id.* at 711("the Third Circuit held that Congress did not allow for ambiguity with regard to the applicability of the ADEA to retiree health benefits.").

The EEOC has repeatedly acknowledged that the ADEA plainly prohibits discrimination in health care benefits on the basis of age.[2/] *See e.g., id.* at 710 ("[t]he EEOC does not dispute the holding of *Erie County*, that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility."). Accordingly, after noting that "[a]n administrative agency, including the EEOC, may not issue regulations, rules or exemptions that go against the intent of Congress," *id.*, the district court concluded that the challenged regulation "is contrary to law and violates the clear intent of Congress in passing and amending the ADEA . . . ." *Id.* at 712. The EEOC timely filed a notice of appeal.

[2/] The EEOC submitted an *amicus curiae* brief in *Erie County*, asserting, "based on the plain language of the ADEA, that (1) retirees are covered by the ADEA and (2) employer reliance on Medicare eligibility in making distinctions in employee benefits violated the ADEA, unless the employer satisfied one of the Act's specified defenses or exemptions." 68 Fed. Reg. at 41545 (July 14, 2003).

While the EEOC's appeal was pending, this Court decided *Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs.* 545 U.S. 967 (2005) ("*Brand X*"). Believing that *Brand X* impacted its prior decision, the district court invited further briefing from both parties. *AARP v. Equal Employment Opportunity Commission*, 390 F. Supp. 2d 437, 442 (E.D.Pa.2005). In the ensuing briefing, the EEOC continued to concede that Congress unambiguously expressed its intent to prohibit reducing or terminating retiree health benefits based on eligibility for Medicare. *Id.* at 451 (". . . the EEOC has represented throughout the litigation that *Erie County* was correctly decided, and that the ADEA does prohibit Medicare coordination of retiree healthcare benefits. . . Nevertheless, the EEOC has argued throughout that it has the power to *exempt* this practice from the prohibitions of the statute under section 9 of the ADEA . . . .") (emphasis in original).

Instead, the EEOC relied on *Brand X* to resurrect the argument – wisely rejected by the district court – that as part of the first step of the *Chevron* analysis, "the court should focus on the language in section 9 [the EEOC's rulemaking authority] rather than on the substantive provisions [§ 4] of the ADEA." *AARP v. EEOC*, 383 F. Supp. 2d at 710. As the district court explained, "Because it has conceded that the ADEA prohibits coordinating retiree benefits with Medicare eligibility, the EEOC argues that the 'precise question' for *Chevron* step one purposes is 'whether Section 9 authorizes the EEOC to issue exemptions . . . ." 390 F. Supp. 2d at 451.

The district court rejected the EEOC's "formulation of the 'precise question'" because it was "required by neither *Chevron* nor *Brand X* and would give the EEOC unfettered discretion to issue regulations that contravene the intent of Congress . . . ." *Id.* Nevertheless, the district court granted the EEOC's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), vacated its earlier opinion, and

granted summary judgment to the EEOC. Although the parties agreed "that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility," 383 F. Supp. 2d at 710, and although the lower court had previously characterized the Third Circuit's ruling in *Erie County* as holding that "Congress *expressed a clear and unambiguous intent* with regard to the precise question at issue," *id.* at 709 (emphasis added), the lower court predicated its reversal on its conclusion that "Congress *did not express a clear and unambiguous intent* to prohibit Medicare coordination of retiree health benefits in the ADEA." 390 F. Supp. 2d at 453 (emphasis added). In explaining this about-face, the lower court stated that it could disregard the "plain language" holding in *Erie County* because, under *Brand X*, the Third Circuit "did not state only one permissible interpretation of the statute, rather than merely the best interpretation." *Id.* at 455. The petitioners timely appealed.

The court of appeals affirmed the grant of summary judgment to the EEOC, but on entirely different grounds than those set forth in either of the district court's summary judgment opinions. *AARP v. EEOC*, 489 F.3d 558 (3d Cir. 2007). The Third Circuit acknowledged the fundamental rule of *Chevron*: "If the intent of Congress is clearly expressed in the statute, 'that is the end of the matter; for the court, as well as the agency,' and such intent must be given effect." *AARP v. EEOC*, 489 F.3d at 562-63 quoting *Chevron*, 467 U.S. at 842-43. But in a novel twist, the court of appeals accepted the EEOC's argument that the focus of its assessment of congressional intent should be on the rulemaking provision of the ADEA, not on the ADEA's substantive provisions. Consequently, the court of appeals held as follows:

> Section 9 unambiguously grants reasonable exemption authority to the EEOC, and plainly states that such

> authority applies to any and all parts of the statute. *Because section 9 clearly grants such authority to the EEOC, the fact that the proposed regulation would allow certain practices not otherwise permitted under section 4 does not render the regulation invalid.*

Id. at 563-64 (emphasis added). Although the Third Circuit agreed with the petitioners that under *Chevron* "no administrative agency is permitted to effectively repeal any portion of a statute by regulation," its singular reliance on the ADEA's rulemaking provision apparently allowed it to conclude that "the proposed regulation at issue is narrowly focused and not contrary to the terms and purpose of the ADEA . . . ." 489 F.3d at 563 n.5; *see id.* at 565 ("Under *Chevron* step one, Congress' express intent to permit such exemptions under section 9 of the ADEA must be given effect . . . .").

The court of appeals also rejected the petitioners' challenge that the EEOC "exemption" was unlawful under section 706(2)(A) of the Administrative Procedure Act (APA), which requires courts to set aside agency rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While the court of appeals concluded that the rule was not "arbitrary or capricious," 489 F.3d at 566-67, it failed to address the petitioners' claim that the "not in accordance with law" standard of section 706(2)(A) of the APA mirrors the required analysis at *Chevron* step one, and that any agency rule that is contrary to plain congressional intent is, by definition, "not in accordance with law" under the APA.

Finally, the petitioners argued that interpreting section 9 of the ADEA as authorizing the agency to overturn clear statutory prohibitions, as the EEOC argued, led to a constitutional conflict under the

separation of powers doctrine, as "no administrative agency is permitted to effectively repeal any portion of a statute by regulation." 489 F.3d at 563 n.5. The court of appeals addressed this claim, however, only in the context of the "delegation doctrine." *See* 489 F.3d at 564 n. 6. Consequently, the Third Circuit found no constitutional impediment to the proposed exemption on the ground that "the EEOC's exercise of its exemption authority through the proposed regulation is narrowly focused to permit a discrete practice pursuant to the purposes of the ADEA." *Id.*

Petitioners timely filed for rehearing en banc, and their motion was denied on August 21, 2007. This petition for certiorari has been filed within ninety (90) days as required by Rule 13 of the Rules of this Court.

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision to focus entirely on the grant of rulemaking authority to the EEOC, and its total disregard for the fact that Congress had directly spoken to "the precise question at issue" in the substance of the ADEA, undermines more than two decades of settled jurisprudence under *Chevron*. The decision below creates a direct conflict over the proper application of *Chevron* with every other circuit court of appeals, and also conflicts with decisions in the Ninth and District of Columbia Circuits over the proper application of section 706(2)(A) of the APA. Beyond that, the Third Circuit's approach has created a constitutional dilemma without precedent. By ignoring the substance of the ADEA at the first step of the *Chevron* analysis, the Third Circuit rendered irrelevant the very factor that *Chevron* deemed pivotal – congressional intent on "the precise question at issue." Had the Third Circuit focused on the substance of the ADEA, it would have acknowledged what the parties do not dispute, that Congress prohibited discrimination in all employee benefits and meticulously crafted an "equal benefit or equal cost"

exception that included health care benefits. This unambiguous statutory expression of congressional intent should have been "the end of the matter," *Chevron*, 467 U.S. at 842, as the ADEA's clarity on "the precise question at issue" left no regulatory gap for the EEOC.

As a consequence of the Third Circuit's focus on the rulemaking delegation – not on the ADEA's substance – the court of appeals affirmed an "exemption" that is admittedly in direct conflict with the plain terms of the statute. This unprecedented result cannot be reconciled with (a) this Court's *Chevron* jurisprudence, (b) the "not in accordance with law" standard of the APA, or (c) the separation of powers doctrine in the Constitution. The Third Circuit's decision threatens to undermine the constitutional balance between congressional legislation and executive agency rulemaking. Under the guise of "exemption" authority, the decision of the court of appeals would permit any executive agency to overrule an explicit statutory command. In this case, the court of appeals' misguided approach threatens the health care benefits of approximately ten million older Americans. Further review is warranted to resolve the circuit conflicts created by the Third Circuit's decision and to correct this consequential error.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING THE PRINCIPLES GOVERNING REVIEW OF AGENCY RULEMAKING SET FORTH IN THIS COURT'S DECISION IN *CHEVRON, U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL* AND THE REVIEW STANDARDS OF SECTION 706 OF THE APA.

A. The Third Circuit's Decision Conflicts with This Court's *Chevron* Jurisprudence And The Proper Application of *Chevron*

In Every Other Circuit.

For more than twenty-three years, the Court's decision in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), has set forth the legal framework for evaluating challenges to agency rules. The Court held that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. This is the "*Chevron* step one" review. If Congress "has not directly addressed the precise question at issue, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is 'reasonable' and not otherwise 'arbitrary, capricious, or manifestly contrary to the statute.'" *See id.*, 467 U.S. at 843-44. This is the "*Chevron* step two" review.

The purpose of ascertaining congressional intent at *Chevron* step one is to determine whether Congress has delegated to the agency the latitude to promulgate rules. "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). "If a statute is ambiguous, and if the implementing agency's construction is reasonable," *Chevron* obligates the federal court to accept the agency rule, even if it differs from what the court believes is the best construction of the statute. *Id.* Conversely, if the statute is clear, then both the agency and the courts must honor congressional intent. *Chevron* deference only operates if there is ambiguity or silence in the statute. *See also Global Crossing Telecomms., Inc. v. Metrophones Telecomms.*, 127 S. Ct. 1513, 1522-23 (2007) (given the "absence of any relevant congressional prohibition" the FCC's interpretation of the term "unreasonable" in section 201(b) of the Communications Act was lawful

and citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001) for the premise that "where 'Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law,' a court 'is obliged to accept the agency's position *if Congress has not previously spoken to the point at issue* and the agency's interpretation' (or the manner in which it fills 'the gap') is 'reasonable.')." (emphasis added); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (an agency's reasonable interpretation of a statutory scheme is owed deference "only 'where Congress has not directly addressed the precise question at issue' through the statutory text." quoting *Chevron* at 843).

Until the decision by the Third Circuit in this case, every circuit court of appeals applying *Chevron* looked, as the Court did in *Chevron*, to the substantive provisions of the statute in question to ascertain congressional intent at "step one." As the Court recently confirmed, "[a]t the first step, we ask whether the statute's plain terms 'directly addres[s] *the precise question at issue.*" *Brand X*, 545 U.S. at 986 quoting *Chevron*, 467 U.S. at 843 (emphasis added). And, of course, "the precise question at issue" is whether the substantive terms of the statute reflect congressional intent on the issue contemplated by the agency rule. In *Chevron*, for example, the issue was whether Congress had expressed intent in the Clean Air Act Amendments of 1977 regarding the phrase "stationary source" that would foreclose an agency rule that permitted the adoption of a "plantwide" definition of that term. Having found that Congress did not express intent on that precise issue, the Court found that the EPA's definition was "a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth." 467 U.S. at 866.

Similarly, in *Brand X*, the task of the Court at the first step of the *Chevron* analysis was to determine whether Congress intended the phrase "telecommunications servic[e]" in the Communications Act to include broadband Internet service. The court of appeals had declined to apply *Chevron* because "it thought the Commission's interpretation of the Communications Act foreclosed by the conflicting construction of the Act [the Ninth Circuit] had adopted . . . ." 545 U.S. at 982. But the Court disagreed, holding that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and leaves no room for agency discretion." *Id.* Concluding that the terms of the Communications Act "admit of two or more reasonable ordinary usages," 545 U.S. at 989, the Court found that the agency's "construction was 'a reasonable policy choice for the [Commission] to make' at *Chevron*'s second step." 545 U.S., at 997 quoting *Chevron*, 467 U.S., at 845.[3]

Consistent with *Chevron*, and without exception, all the other circuits focus on the substance of the statute in question – not the rulemaking delegation – to determine congressional intent at *Chevron* step one. *See, e.g., Nat'l Res. Def. Council v. EPA*, 489 F.3d 1364, 1372 (D.C. Cir. 2007) (EPA's interpretation of § 112(c)(9) of the Clean Water Act was contrary to the plain language of the statute; "That EPA may have broad . . . authority, however,

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[3] *See also Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345 (2007) (citing *Chevron* in referencing the "power of an administrative agency...to fill any gap left, implicitly or explicitly by Congress," and explaining that "[w]hen an agency fills such a 'gap' reasonably, and in accordance with other applicable (e.g. procedural) requirements, the courts accept the result as legally binding.").

does not authorize EPA to sidestep what Congress has plainly prohibited."); *Dominion Energy Brayton, LLC v. Johnson*, 443 F.3d 12, 17-18 (1st Cir. 2006) (Congress's intent behind the term "public hearing" in the Clean Water Act was ambiguous allowing the EPA to interpret the term as not mandating evidentiary hearings); *Mizrahi v. Gonzales*, 492 F.3d 156, 160 (2d Cir. 2007) (Board of Immigration Appeals reasonably resolved ambiguity in the Immigration and Nationality Act by determining that drug solicitation qualifies as "a violation of . . . any law . . . relating to a controlled substance"); *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 202-03 (4th Cir. 2005) (the text of ADEA §§ 623(a), (b), (c) and (f) "evinces no prohibition" of the EEOC's regulation subjecting apprenticeship programs to the Act); *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884, 890-92 (5th Cir. 2004) (§ 304 of the Deep Water Royalty Relief Act unambiguously granted royalty suspensions for new leases invalidating the Department of the Interior's regulation granting suspension only if lease was determined to be in a field that had not produced prior to enactment of Act); *Harris v. Olszewskj*, 442 F.3d 456, 466 (6th Cir. 2006) (Health and Human Services' interpretation of term "medical devices" in Medicaid Act as including incontinence products is valid because Congress had not addressed the issue); *Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 727-29 (7th Cir. 2004) (upholding the Department of Labor's decision to include quasi-public entities as covered "employers" under the Worker Adjustment and Retraining Notification Act (WARN) because Congress had not defined "business enterprise"); *Baptist Health v. Thompson*, 458 F.3d 768, 774 (8th Cir. 2006) ("Under step one of the *Chevron* analysis, we determine whether the statute makes clear the intent of Congress as to the meaning of the term 'approved educational activities.'"); *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1111-12 (9th Cir. 2006) (since the phrase "upon the same terms and conditions as those provided in the agreement" in § 252(i) of the Telecommunications Act of 1996 was

ambiguous, the FCC's interpretation of the statute was reasonable); *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 727-29 (10th Cir. 2006) (because Congress had left an "implicit statutory gap" in the Family Medical Leave Act, the Secretary of Labor's regulation prescribing a method for measuring "within 75 miles" was reasonable); *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004) (the "plain language" of the Wilderness Act contradicts the National Park Service's interpretation allowing for motorized public access to historical structures across designated wilderness areas).

In the more than twenty years since *Chevron* was decided, there is not one case to support the Third Circuit's unprecedented deviation from the *Chevron* protocols. Neither the Third Circuit nor the EEOC has cited to a single case in which a court has held that a rulemaking delegation trumps congressional intent clearly expressed in the substance of the statute. *See AARP v. EEOC*, 383 F. Supp. 2d at 712 (lower court finding that "[t]he EEOC cited no relevant cases supporting its analysis of this case."); *AARP v. EEOC*, 390 F. Supp. 2d at 453 ("neither the parties nor this Court has found any case that sanctions congressional delegation to an agency of the authority to undo what Congress has done through clear and unambiguous statutory language.").

The Third Circuit stated that its holding was "analogous to the Second Circuit's approach in *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286 (2d Cir. 2006)." *AARP v. EEOC*, 489 F.3d at 565 n. 10. But the facts of *Schiller* are far different than those presented here. The issue in *Schiller* was whether the Securities and Exchange Commission had properly "exempted" certain foreign issuers of securities from the proxy statement requirements of the Securities Exchange Act of 1934. As the Second Circuit noted, the substantive provision of the Act "[b]y its own terms, does not apply to 'exempted securit[ies].'" 449

F.3d at 291. And the Act's definition of "exempted securities" includes any that the SEC may "exempt from the operation of any one or more provisions of this chapter which do not apply to an 'exempted security' or to 'exempted securities.'" *Id.* By embedding the SEC's exemption authority in a substantive provision of the statute, Congress made clear its intent that specific substantive provisions would not apply to "exempted securities." The administrative rule challenged in the litigation exempted "[s]ecurities registered by a foreign private issuer," a classification not expressly addressed by the proxy rules or by the statute's own definition of "exempted securities."

Although *Schiller* did not mention *Chevron*, it appears clear that the challenged rule regarding securities issued by a "foreign private issuer" addressed an ambiguity in the statute, as *Chevron* would allow. Moreover, the substantive provisions of the statute in question expressly contemplated "exemptions," which is far from the case here. Indeed, when Congress passed the OWBPA in 1990, it expressly incorporated specific exceptions for certain benefit practices, none of which involve the type of overt discrimination in health care benefits permitted by the challenged rule. *See, e.g.*, 29 U.S.C. § 623 (f)(2)(B)(i) (the "equal benefit or equal cost" exception); *id.* at § 623(f)(2)(B)(ii)(exception for "voluntary early retirement incentive plan[s]"); *id.* at § 623(l)(1)(B) (permitting subsidized early retirement benefits, social security supplements, and a severance offset for the value of retiree health care benefits). Unlike *Schiller*, there is no hint of ambiguity in the ADEA's substantive provision "on the precise issue in question," nor is there any evidence that Congress intended (or contemplated) statutory exceptions beyond those that it handcrafted.

Indeed, the Third Circuit's mistaken disregard of the ADEA's substance at *Chevron* step one –

contrary to all the other circuits – has created an additional circuit conflict that warrants resolution by this Court. The Third Circuit's holding that an executive agency rule can "exempt" conduct that Congress clearly intended to prohibit is in direct conflict with holdings to the contrary in the Seventh, Ninth and District of Columbia Circuits. The issue in both *Diersen v. Chicago Car Exch.*, 110 F.3d 481 (7th Cir. 1997) and *Orca Bay Seafoods v. Nw. Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994) was whether the National Highway Traffic Safety Administration had the authority to exempt certain classes of vehicles from the Vehicle Information and Cost Saving Act which required all persons transferring a motor vehicle to provide an accurate, written odometer reading to the recipient of the vehicle. Under challenge in *Diersen* was a regulation that exempted from the odometer requirements all vehicles that are at least ten years old. *Diersen*, 110 F.3d at 483. In *Orca Bay*, the plaintiff challenged a virtually identical regulation that purported to exempt from the odometer requirements "transfers of trucks with gross vehicle weight ratings of more than 16,000 pounds." *Orca Bay*, 32 F.3d at 434. Both courts of appeals found the challenged rules contrary to plain statutory language and, therefore, unlawful. The Court in *Diersen* summarized the bedrock of both holdings:

> Th[e] principle is that "legislative power rests in Congress and . . . the will of Congress as unambiguously expressed in a properly enacted statute cannot be amended or altered by regulation . . . . [A] regulation to the extent it is in direct variance with an unambiguous statutory provision is void."

Diersen, 110 F.3d at 486 (citations omitted).

In language directly applicable to the dispute here, the Seventh Circuit noted that "[t]here may be

good policy reasons for exempting older vehicles from the requirements of the Act, but that determination is legislative in nature and is properly made by Congress, and not by regulatory fiat." *Id.* at 487 (footnote omitted); *accord Orca Bay*, 32 F.3d at 437 ("In the statute at issue, Congress left no gap, no silence, no ambiguity, so 'we must give effect to the plain language that Congress chose.'") quoting *United States v. Geyler*, 949 F.2d 280, 283 (9th Cir. 1991). Both the analysis and the holdings in *Diersen* and *Orca Bay* are directly at odds with the decision of the Third Circuit in this case.

Similarly, the District of Columbia Circuit relied on *Chevron* to reject an Environmental Protection Agency (EPA) regulation that "exempted" certain equipment replacement activity from the provisions of the Clean Air Act. *State of New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006). Under the Clean Air Act, sources of emissions "that undergo 'any physical change' that increases emissions are required to undergo the NSR [New Source Review] permitting process." 443 F.3d at 883. A regulatory "exclusion has historically provided that routine maintenance, repair, and replacement do not constitute changes triggering NSR." *Id.* The EPA's challenged regulation, however, "both defined and expanded that exclusion," to allow sources to replace up to 20 percent of the replacement value of the process unit and still remain within the exclusion. *Id.* As the D.C. Circuit observed, the exemption rule "would allow sources to avoid NSR when replacing equipment under the twenty-percent cap *notwithstanding a resulting increase in emissions.*" *Id.* (emphasis added).

Like here, the plain effect of the challenged rule in *State of New York* was to create a regulatory exemption that would have removed entirely and without further scrutiny a broad range of actions that were explicitly barred by the substantive provisions of the Clean Air Act. The D.C. Circuit was not distracted

by the EPA's rulemaking provision, and instead applied the time-honored test of *Chevron*, holding that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 884 quoting *Chevron*, 467 U.S. at 843 n. 9. Under *Chevron* step one, the court found that the challenged exemption was "contrary to the plain language of section 111(a)(4) of the Act," *id.* at 883, which evinced Congress' clear intent to apply the Clean Air Act to any physical modifications of a source that increased emissions.

Equally important, the D.C. Circuit observed how the exemption would wholly frustrate the fundamental purpose of the Clean Air Act by producing "a 'strange,' if not an 'indeterminate,' result: a law intended to limit increases in air pollution would allow sources operating below applicable emission limits to increase significantly the pollution they emit without government review." *Id.* at 886. So too here, a law intended to prohibit age discrimination that expressly permits employers to adjust benefits when they are *more* expensive to provide to older workers would allow employers to arbitrarily eliminate health care coverage for millions of Americans at age 65. Moreover, the proposed exemption would sanction this result even when the older individuals' benefits are admittedly *much less* expensive than those provided to younger individuals. Like the Seventh Circuit in *Diersen*, and the Ninth Circuit in *Orca Bay*, the D.C. Circuit made clear that an agency cannot make policy determinations that conflict with choices made by Congress. "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Id.* at 889 quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

Finally, the Third Circuit's holding that the EEOC may issue an "exemption" which the parties agree is contrary to the plain language of the ADEA also runs afoul of the Court's holding in *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). In rejecting the validity of the original "equal benefit or equal cost" regulation (prior to its codification by Congress in the OWBPA), the Court held that "no deference is due to agency interpretations at odds with the plain language of the statute itself." 492 U.S. at 171; *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (holding that an EEOC "'interpretation' of the statute cannot supersede the language chosen by Congress.").

B. The Approach By The Third Circuit To The "Not in Accordance With Law" Standard of Section 706(2)(A) of the Administrative Procedure Act Presents A Conflict Among the Circuits.

The Third Circuit compounded its error in the misapplication of *Chevron* by committing an almost identical mistake in the application of § 706 of the APA. The APA review provisions are expressly incorporated into the ADEA's grant of rulemaking authority, which states that, the EEOC:

> *In accordance with the provisions of subchapter II of chapter 5 of Title 5 [the APA].* . . . may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 628 (emphasis added). As the Third Circuit acknowledged, § 706(2)(A) of the APA requires

courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law.*" 489 F.3d at 565-66 citing 5 U.S.C. § 706(2)(A) (emphasis added).

The Third Circuit's erroneous application of the limitations of § 706 was based once again on its improper focus on the rulemaking provision to the disregard of the ADEA's statutory commands. *Id.* at 566 ("The EEOC has shown the regulation to be reasonable, necessary, and proper according to the terms and purposes of the statute."). Both the Ninth and the D.C. Circuits (as well as an earlier decision by the Third Circuit) have applied the analysis of *Chevron* step one to determine whether agency action is "not in accordance with law" under § 706(2)(A) of the APA. Unlike the Third Circuit here, which incorrectly focused on the rulemaking delegation, the Ninth and D.C. Circuits addressing § 706 of the APA have focused their analysis on the substance of the statute as the universal application of *Chevron* requires.

For example, in *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638 (9th Cir. 2007), the issue was whether a permit issued by the Corps of Engineers violated the Clean Water Act. The Ninth Circuit's review was governed by § 706(2)(A) of the APA. *Id.*, 486 F.3d at 643. In articulating the "not in accordance with law" requirement of § 706(2)(A), the Ninth Circuit applied verbatim the standard set by the Court at *Chevron* step one:

> We begin, as we must, with the text of the Clean Water Act itself to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

> unambiguously expressed intent of Congress."

Id. at 644 quoting *Chevron, supra*, 467 U.S. at 842-43. Applying *Chevron*, the Ninth Circuit relied on the "plain language" of the Clean Air Act to conclude that the statute was "unambiguous" on the issue in dispute. *Id.* Consequently, the court reversed the entry of summary judgment and remanded the matter to the district court to vacate the permit at issue.

The Ninth Circuit had earlier applied the *Chevron* step one analysis to an APA challenge involving the High Seas Fishing Compliance Act. *Turtle Island Restoration v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003). In setting aside the agency action challenged in *Turtle Island*, the Ninth Circuit focused on the substance of the Compliance Act and concluded that the agency was "not entitled to *Chevron* deference because it [the challenged action] is contrary to the unambiguous language of the statute." *Id.* at 975.

The Third Circuit's disregard for the substantive provisions of the ADEA in its analysis under § 706 of the APA also conflicts with the § 706 analysis by the Court of Appeals for the D.C. Circuit. In *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), the plaintiffs brought an APA challenge to a "decision by the Fish and Wildlife Service to issue a permit authorizing the otherwise unlawful 'taking' of the endangered Delmarva fox squirrel in connection with a proposed residential development." *Id.* at 175. The plaintiffs alleged that the agency failed to follow certain required procedures in violation of APA § 706(2)(D), and that the decision itself was in violation of the standards set forth in § 706(2)(A). *Id.* at 178. Looking to the substance of the Endangered Species Act, the court found that the issuance of the permit violated the statute because the agency "failed to find that the developer would minimize the impacts of the taking,"

as required by 16 U.S.C. § 1539(a)(2)(B). *Id.* at 184. Consequently, the court concluded that the agency "acted 'otherwise not in accordance with law,'" under § 706(2)(A) of the APA. *Id.* at 186.

Here, had the Third Circuit adopted the analytical framework applied by the Ninth and D.C. Circuits to challenges under § 706(2)(A) of the APA, and focused instead on the substance of the statute, it would have found (as the parties agree) that Congress' prohibition on discrimination in health care benefits was clear and unambiguous, and that "would have been the end of the matter." *Chevron*, 467 U.S. at 842. Ironically, the Third Circuit's analysis in this case deviated from prior circuit precedent under the APA. In *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 152 (3d Cir. 2004), the Third Circuit reviewed a decision of the Secretary of Health and Human Services denying reimbursement to a hospital for graduate medical training expenses. At issue in the case was "a special graduate medical education cost documentation rule for reaudits" issued by the Secretary which had been relied upon to disallow Medicare reimbursement to the hospital. *Id.* at 152. The court applied the standard of review of APA § 706, *id.* at 151, and rejected the agency's rule stating "[w]e owe no deference to an agency interpretation plainly inconsistent with the relevant statute." *Id.* at 152.

II. THE COURT SHOULD GRANT REVIEW BECAUSE PERMITTING EEOC REGULATIONS TO OVERRULE THE ADEA'S PLAIN STATUTORY LANGUAGE VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.

The Third Circuit's missteps have resulted in a constitutional morass without precedent. Although it is undisputed that the ADEA expressly prohibits age

discrimination in health care benefits,[4/] the EEOC rule repeals those portions of the ADEA that mandate non-discriminatory health care benefits. *See Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 215 (3d Cir. 2000) ("the *plain language* of section 623(f)(2)(B)(i) – through its express reference to 29 C.F.R. § 1625.10 – indicates that *Congress intended* section 623(f)(2)(B)(i) to apply when an employer reduces health benefits based on Medicare eligibility.") (emphasis added).

If, as according to the Third Circuit, section 9 of the ADEA authorizes the EEOC to overturn plain congressional intent, then section 9 is most certainly unconstitutional as applied. The EEOC has no more authority to permit overt discrimination in employee benefits – contrary to congressional intent -- than it does to impose mandatory retirement, also a practice long ago outlawed by Congress. The Constitution does not permit the executive branch to overturn legislation enacted by Congress.

Article I, Section 1 of the U.S. Constitution states that "all legislative Powers herein granted shall be vested in a Congress of the United States." This explicit separation of power from the Executive Branch is clear. Simply put, "[t]here is no provision in the

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[4/] Indeed, the EEOC has repeatedly explained that were it not for the plain language of the ADEA, its "exemption" would be wholly unnecessary. For example, in the EEOC's Opposition to Plaintiffs' Motion for Preliminary Injunction, the agency chastised the petitioners for "devot[ing] an inordinate amount of time in their brief stating the obvious, namely that the proposed regulation exempts conduct that is prohibited by the ADEA . . . Clearly if that conduct were not proscribed by the ADEA there would be no need for an exemption."); *see also AARP v. EEOC*, 383 F. Supp. 2d at 710 ("The EEOC does not dispute the holding of *Erie County*, that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility.").

Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *see also INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statues, no less than enactment, must conform with Art[icle] I."); *id.*, n. 18 ("There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.").

The Third Circuit acknowledged the constitutional dilemma. 489 F.3d at 563 n. 5 (". . . AARP correctly notes that no administrative agency is permitted to effectively repeal any portion of a statute by regulation. . . ."). But the court of appeals sidestepped the issue, remarkably, by holding that the rule "is narrowly focused and not contrary to the terms and purpose of the ADEA . . . ." *Id.* The Third Circuit's holding that the rule was not contrary to the terms and purpose of the ADEA is in direct conflict, however, with (a) the language of the ADEA and congressional intent behind the enactment of the OWBPA, (b) the positions of the parties throughout the litigation, and (c) the Third Circuit's own reasoning ("the fact that the proposed regulation would allow certain practices not otherwise permitted under section 4 does not render the regulation invalid."). 489 F.3d at 564. As this Court confirmed in *Clinton,* 524 U.S. at 438, "[R]epeal of statutes, no less than enactment, must conform with Art. I."[5/]

The Third Circuit's discussion of the "delegation doctrine" does not avoid the unconstitutional result reached here. 489 F.3d at 564 n. 6. The problem is not that the section 9 delegation is inherently unconstitutional, but rather it is the Third Circuit's

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[5/] If section 9 authorizes the EEOC to overturn statutory provisions, as the Third Circuit's decision implies, it also violates the Presentment Clause. U.S. Const., art. I, § 7; *see Clinton*, 524 U.S. at 442-47.

sweeping interpretation that rendered that result. Indeed, the APA limitations expressly incorporated into section 9 (arbitrary, capricious and not in accordance with law), when buttressed by section 9's self-imposed limitations that exemptions must be "reasonable" and "necessary and proper in the public interest," provide an "intelligible principle" by which to regulate. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001). Simply put, a rule that flies in the face of clear congressional intent is "not in accordance with law," could never be "reasonable," and is contrary to, not "necessary and proper in the public interest." Had the Third Circuit given practical meaning to the limitations on the section 9 delegation, it would not have reached the unconstitutional result it has fashioned. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Indus. Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J. concurring) quoting *Field v. Clark*, 143 U.S. 649, 692 (1892).

At virtually every turn (*Chevron*, § 706 of the APA, and the limitations contained in section 9), the Third Circuit was presented with opportunities to hold the EEOC's proposed rule unlawful. The Third Circuit's failure to seize any of those opportunities, ironically, runs afoul of the time-honored principle even the circuit court acknowledged: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." 489 F.3d at 564 n. 6, quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

Finally, the constitutional conflict is apparent from the EEOC's claim that the challenged regulation is "in the public interest." According to the EEOC, it is in the "public interest" to permit employers to

discriminate on the basis of age against individuals age 65 and older, all in the "hope" that employers permitted to cut those expenses will beneficently maintain health care coverage for younger retirees. But what the EEOC believes is in the "public interest" clashes head on with what Congress concluded when it passed the OWBPA in 1990.[6/] This direct confrontation is apparent from the EEOC's own regulations governing the issuance of exemptions under the ADEA.

The EEOC's own regulations indicate that:

> "[t]he authority conferred on the Commission by section 9 ...will be exercised with caution and due regard for the remedial purpose of the statute *to promote employment of older persons* based on their ability rather than age and *to prohibit arbitrary age discrimination* in employment. Administrative action *consistent with this statutory purpose* may be taken . . . when found necessary and proper in the public interest in accordance with the statutory standards."

29 C.F.R. § 1627.15(b) (emphasis added).

The challenged rule does not serve either of these two statutory purposes, either logically or factually. First, the exemption plainly undermines the statutory purpose of prohibiting arbitrary age

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[6/] This Court has ruled that courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 32 (1981).

discrimination by allowing employers to specifically target individuals for the elimination of health care benefits based *solely* on their age. Rather than prohibit arbitrary age discrimination, the challenged rule sanctions it. Second, the EEOC rule cannot rationally "promote employment of older persons" because, by its terms, it only applies to retired employees.

Faced with the obvious contradiction between the rule and congressional intent behind the ADEA, there are only *two sentences* in the entire rulemaking record regarding the observance of these statutory purposes. Included in the EEOC's Federal Register announcement of the proposed exemption is the agency's *ipse dixit* that "[t]he proposed exemption shows due regard for the Act's prohibition against arbitrary age discrimination in employment – a central concern of Congress when it enacted the ADEA. The exemption is also consistent with the Act's purpose of promoting the employment of older persons. . . ." 68 Fed. Reg. at 41547 (July 14, 2003). These conclusory statements are bereft of any explanation as to how those critical statutory purposes are advanced by a rule that permits wholesale age discrimination against approximately ten million individuals. The Third Circuit sidestepped altogether the two remedial purposes of the ADEA, however, and ruled in similar conclusory fashion that "[t]he EEOC has shown the regulation to be reasonable, necessary, and proper according to the terms of the statute." 489 F.3d at 566.

Ultimately, the Third Circuit's decision unconstitutionally allows an executive agency to substitute its judgment for that of Congress. That precise result was emphatically rejected by the courts in *Diersen*, *Orca Bay* and *State of New York*.

> If we were to defer to the Secretary's judgment about the wisdom of exempting large trucks, despite Congress's

> determination not to exempt them, we would in effect allow lobbyists to appeal from the legislative to the executive branch after a bill has become law. ...The executive branch is not a tribunal to which affected interests can appeal adverse legislative judgments. For all we know, the same trucking interests mentioned by the Secretary in his explanation made the same arguments to Congress, lost, and then asked the Secretary to undo what they saw as a legislative misjudgment.

Orca Bay, 32 F.3d at 437.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7] In fact, that is precisely what occurred here. Language virtually identical to the EEOC's proposed exemption was proposed but excluded from the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003). Almost all of the *amici* that support the EEOC rule (*see* 489 F.3d at 564 n.9) were unsuccessful in their efforts to convince Congress to amend the ADEA to allow employers to reduce or terminate retiree health benefits at age 65. *Medicare Drug Deal Would Exclude Employers' Subsidies From Taxes*, Daily Lab. Rep. (BNA) No. 222, at A-7 (Nov. 18, 2003). *See also* http://www.eric.org/forms/uploadFiles/2D5600000002.filename.Erie_Conferee_letter_Grassley_Thomas_Sept03.pdf.

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Argued: February 27, 2007

Filed: June 4, 2007

Docket No. 05-4594

AMERICAN ASSOCIATION OF RETIRED PERSONS; Jack W. MacMillan; Frank H. Smith, Jr.; Frank A. Wheeler; Fred Dochat; Gerald Fowler; M. Elaine Clay,

Appellants,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Christopher G. Mackaronis (Argued), Brickfield, Burchette, Ritts and Stone, Laurie A. McCann, AARP Foundation, Washington, DC, Stephen G. Console, Philadelphia, PA, Counsel for Appellants.

Anthony A. Yang (Argued), Untied States Department of Justice, Appellate Section, Marleigh D. Dover, United States Department of Justice, Washington, DC, Counsel for Appellees.

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Washington, DC, Counsel for Amicus-Appellees National Education Association; American Federation of Teachers; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; American Federation State, County and Municipal Employees; Untied Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; and International Association of Fire Fighters. Ann E. Reesman, McGuiness, Norris & Williams, Washington, DC, Counsel for Amicus-Appellees Equal Employment Advisory Council; HR Policy Association; America's Health Insurance Plans; American Benefits Council; ERISA Industry Committee; National Rural Electric Cooperative Association; Society for Human Resource Management; American Council on Education; College and University Professional Association for Human Resources; and WorldatWork.

Before: MCKEE and ALDISERT, Circuit Judges, and RESTANI*, Judge.

OPINION OF THE COURT

RESTANI, Judge.

Appellants American Association of Retired Persons, et al. ("AARP"), appeal a judgment of the United States District Court for the Eastern District of Pennsylvania. The District Court vacated, on the basis of a significant change in law, a previous grant of summary judgment in favor of AARP, and instead granted summary judgment in favor of the Equal Employment Opportunity Commission ("EEOC"). At

issue is a regulation that would exempt from the Age Discrimination in Employment Act ("ADEA")[8] employer coordination of retirement benefits with, *inter alia*, Medicare benefits. AARP challenges the regulation as contrary to the terms of the ADEA, and seeks to reinstate the District Court's permanent injunction against implementation of the regulation. We will affirm the District Court's order granting summary judgment in favor of the EEOC on grounds other than those relied on by the District Court.

BACKGROUND

On July 14, 2003, the EEOC published a notice of proposed rulemaking to exempt from the prohibitions of the ADEA "the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program." *Age Discrimination in Employment Act; Retiree Health Benefits*, 68 Fed. Reg. 41,542, 41-542 (EEOC July 14, 2003) (notice of proposed rulemaking).[9] AARP brought suit in the Eastern

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[8] 29 U.S.C. §§ 621-34, as amended by the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990).

[9] The final rule would read as follows:

> (b) *Exemption.* Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan. Pursuant to the authority contained in section 9 of the [ADEA], and in accordance with the procedures provided therein . . . it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health

District of Pennsylvania on February 4, 2005, challenging the proposed regulation under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"), and the ADEA. *AARP v. Equal Employment Opportunity Comm'n*, 383 F. Supp.2d 705, 708 (E.D.Pa. 2005) ("*AARP I*").

Initially, the District Court granted summary judgment in favor of AARP, holding that the challenged regulation was contrary to law under this court's decision in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). In *Erie County*, consistent with the position of the EEOC in that action, we held that, as Medicare eligibility is age dependent, the ADEA did not permit reduction or termination of retiree health benefits upon Medicare eligibility unless the employer met the "equal benefit or equal cost" defense set forth in section 4 of the ADEA.[10] *Id.* at 217. Accordingly, here the District Court stated that "[b]ecause the Third Circuit held in *Erie County* that Congress intended the ADEA to apply to the exact same behavior that the EEOC would exempt, the EEOC's challenged exemption is contrary to Congressional intent and the plain language of the

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benefits with Medicare or a comparable State health benefit plan. 68 Fed. Reg. at 41,548-49.

[10] The relevant portion of 29 U.S.C. § 623 reads as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . to observe the terms of a bona fide employee benefit plan . . . where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.

29 U.S.C. § 623(f)(2)(B)(i).

ADEA." *AARP I*, 383 F. Supp. 2d at 710. The District Court permanently enjoined the EEOC from "publishing or otherwise implementing the regulation at issue." *Id.* at 712. The EEOC appealed that judgment.

On June 27, 2005, while the first appeal was pending, the Supreme Court decided *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed 2d 820 (2005). *Brand X* held that prior judicial interpretation of a statute bars subsequent agency interpretations only where the precedent "unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Brand X*, 545 U.S. at 983, 125 S.Ct. 2688. The EEOC moved for relief from judgment in the District Court, citing *Brand X* as an intervening change of law with respect to the court's application of *Erie County* and arguing that its proposed regulation was consistent with the statute. *AARP v. Equal Employment Opportunity Comm'n* 390 F. Supp. 2d 437, 441-42 (E.D.Pa. 2005) ("*AARP II*"). The District Court granted the motion, vacating its decision in *AARP I* and granting summary judgment in favor of the EEOC. *Id* at 462. The District Court stayed its order lifting the permanent injunction pending any appeal. *Id.* at 463. AARP appeals.

JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's grant of summary judgment *de novo*. *Concerned Citizens Alliance, Inc., v. Slater*, 176 F.3d 686, 693 (3d Cir. 1999).

DISCUSSION

At issue is whether the proposed regulation is within the EEOC's authority under the ADEA, and whether the regulation is valid under the APA.

I. The Proposed Regulation is Within the EEOC's Exemption Authority Under Section 9 of the ADEA.

There is a well-trodden two-step approach to judicial review of an agency regulation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984). Step one asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. If the intent of Congress is clearly expressed in the statute, "that is the end of the matter; for the court, as well as the agency," and such intent must be given effect. *Id.* at 842-43, 104 S.Ct. 2778. "[I]f the statute is silent or ambiguous with respect to the specific issue," then the court proceeds to a step-two determination of whether the agency interpretation is based on a "permissible construction" of the statute. *Id.* at 843, 104 S.Ct. 2778.

The precise question in this case is whether the EEOC has the power to issue a regulation exempting from the prohibitions of the ADEA employer-sponsored benefits plans that coordinate retiree health benefits with eligibility for Medicare or state-sponsored health benefits programs. Section 9 of the ADEA authorizes the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest." 29 U.S.C. § 628. The EEOC acknowledges this source of authority in its notice of the proposed rulemaking, stating that "[a]fter an in-depth study, the Commission believes that the practice of [coordinating retiree health benefits with Medicare eligibility] presents a circumstance that warrants Commission exercise of its

ADEA exempting authority . . . [P]ursuant to its authority under Section 9 of the Act, the EEOC proposes . . . this notice of proposed rulemaking." 68 Fed. Reg. at 41,542.

Section 9 clearly and unambiguously grants to the EEOC the authority to provide, at least, narrow exemptions from the prohibitions of the ADEA. By definition, the power to grant "exemptions" provides an agency with authority to permit certain actions at variance with the express provisions of the statute in question. By stating that "*any or all* provisions" may be subject to exemptions,[11/] Congress made plain its intent to allow limited practices not otherwise permitted under the statute, so long as they are "reasonable" and "necessary and proper in the public interest." 29 U.S.C. § 628 (emphasis added).[12/] Because the language of section 9 expressly grants to the EEOC the power to implement such exemption shown by the agency to be reasonable, necessary, and proper falls within the agency's authority under the statute.

AARP argues that the proposed exemption exceeds the EEOC's authority under section 9 because it would allow certain employer practices otherwise

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[11/] "The term 'exemption' is ordinarily used to denote relief from a duty or service." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 421, 103 S.Ct. 1921, 76 L.Ed. 2d 22 (1983). *See also id.* ("[T]o 'exempt' is 'to relieve, excuse or set free from a duty or service imposed upon the general class to which the individual exempted belongs.'")(quoting *Black's Law Dictionary* 513 (5th ed. 1979)).

[12/] Although AARP correctly notes that no administrative agency is permitted to effectively repeal any portion of a statute by regulation, *see, e.g., United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999), the proposed regulation at issue is narrowly focused and not contrary to the terms and purpose of the ADEA, and therefore does not present such a challenge.

prohibited by the ADEA. (See Appellants' Br. 35-36.) AARP points to section 4 of the ADEA, which states that "[i]t shall be unlawful for an employer . . . [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). As discussed previously, however, it is clear that Congress intended to permit limited exemptions from the ADEA, including the antidiscrimination provision of section 4. Section 9 unambiguously grants reasonable exemption authority to the EEOC, and plainly states that such authority applies to any and all parts of the statute. Because section 9 clearly grants such authority to the EEOC, the fact that the proposed regulation would allow certain practices not otherwise permitted under section 4 does not render the regulation invalid.

This is not to say that the EEOC's exemption authority is unlimited. As indicated, section 9 limits permissible exemptions to those that are shown to be "reasonable" and "necessary and proper in the public interest." 29 U.S.C. § 628.[13] Here, the EEOC issued

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[13] According to the "delegation doctrine," under the Constitution Congress is required to limit delegations of legislative authority by setting forth in the relevant statute "'an intelligible principle to which the [agency] authorized to [act] is directed to conform.'" *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 114 L.Ed. 2d 219 (1991) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)). We must narrowly interpret section 9 of the ADEA, if possible, to avoid any potential delegation problem. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646, 100 S.Ct. 2844, 65 L.Ed. 2d 1010 (1980) ("A construction of the statute that avoids [an] open-ended grant [of legislative authority] should certainly be favored."); *see also United Sates v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that

the proposed regulation in response to its finding that employer-sponsored retiree health benefits were decreasing. 68 Fed. Reg. at 41,543-44. Rather than maintaining retiree benefits at pre-Medicare eligibility levels for all retirees in order to avoid discrimination under the ADEA, some employers chose to reduce all retiree health benefits to a lower level. *Id.* at 41,546. Further, in addition to rising health care costs and increased demand for retiree benefits, the EEOC correctly noted[14/] that employers are not required to provide any retiree health benefits, or to maintain such plans once they have been established.[15/] *Id.* at 41,542-43. Retiree benefits often face elimination under these constraints, and the EEOC issued the proposed exemption to "permit[ ] employers to offer

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score."). In section 9, Congress establishes clear limitations on the EEOC's exemption authority by requiring that the exemptions be "reasonable" and "necessary and proper in the public interest." 29 U.S.C.§ 628. We interpret this to require narrow exemptions tailored to the overall purpose of the ADEA, an intelligible principle. Here, the EEOC's exercise of its exemption authority through the proposed regulation is narrowly focused to permit a discrete practice pursuant to the purposes of the ADEA. As discussed, the proposed regulation adheres to the limitations set forth in section 9. Therefore, the exemptions at issue does not run afoul of the requirements of the delegation doctrine.

[14/] *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 77, 115 S.Ct. 1223, 131 L.Ed. 2d 94 (1995) (stating that employers "are generally free under [the Employee Retirement Security Act, 29 U.S.C. § 1001, *et seq.*] for any reason at any time to adopt, modify, or terminate welfare plans").

[15/] There are exceptions to this general rule. The federal government, for example, is required to offer health benefits to some retirees. *See* 5 U.S.C. §§ 8901(3), 8905(b).

[retiree] benefits to the greatest extent possible."[16] *Id.* at41,543. We recognize with some dismay that the proposed exemption may allow employers to reduce health benefits to retirees over the age of sixty-five while maintaining greater benefits for younger retirees. Under the circumstances, however, the EEOC has shown that this narrow exemption from the ADEA is a reasonable, necessary and proper exercise of its section 9 authority, as over time it will likely benefit all retirees.[17]

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[16] As noted by the District Court, the proposed exemption has the support of various amici curiae, including labor and industrial organizations. *See AARP II*, 390 F. Supp. 2d at 441-42 n.3; *see also* Br. of Amicus Curiae Chamber of Commerce of the United States; Br. of Amici Curiae National Education Association, American Federation of Teachers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, American Federation of State, County and Municipal Employees, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and International Association of Fire Fighters; Br. of Amici Curiae Equal Employment Advisory Council, HR Policy Association, America's Health Insurance Plans, American Benefits Council, ERISA Industry Committee, National Rural Electric Cooperative Association, Society for Human Resource Management, American Council on Education, College and University Professional Association for Human Resources, and WorldatWork.

[17] This is analogous to the Second Circuit's approach in *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286 (2d Cir. 2006), which upheld the Security and Exchange Commission's statutory authority to issue exemptions, so long as the exemptions are shown to be in the public interest and maintain sufficient protections for the class protected by the statute. *See Schiller*, 449 F.3d at 296-97 ("The practical effect of an exemption . . . . is, everything else being equal, a decrease in the net level of investor protection. Therefore, the prohibition of any decrease in the level of investor protection would at the very least substantially curtail,

It is clear that the proposed regulation is expressly authorized by the terms of section 9 of the ADEA. The proposed exemption permits the narrow practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare and state-sponsored health programs for the necessary and proper purpose of encouraging employers to provide the greatest possible health benefits for all retirees. The regulation is consistent with the purposes and intent of the ADEA, and is a reasonable exercise by the EEOC of authority delegated to it by Congress.

Under *Chevron* step one, Congress' express intent to permit such exemptions under section 9 of the ADEA must be given effect; it is unnecessary to proceed to step two. We note, however, that the reasonableness inquiry made here under *Chevron* step one as to the statutory limitations on exemptions is similar to the usual reasonableness inquiry under *Chevron* step two. Nonetheless, we do not decide the extent to which our decision in *Erie County* permits of more than one reasonable interpretation of the statute. The District Court, applying *Brand X*, held that *Erie County* set forth "only the best of several alternatives [and] is not the 'only permissible' interpretation" of the ADEA, *AARP II*, 390 F. Supp. 2d at 448. We do not reach this issue because we do not find, as did the District Court, that ambiguity must be present in the ADEA in order for the EEOC to exercise its authority under section 9. Rather, the proposed regulation presents a narrow exemption expressly authorized by the statute. Therefore, even if *Erie County* sets forth

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if not completely eviscerate, the Commission's exemptive authority. Such an effect is clearly at odds with congressional intent to grant the Commission flexibility in adopting exemptions. We therefore conclude . . . that the Commission can promulgate an exemption once it has determined that the exemption serves the public interest while at the same time leaving in place adequate investor protections." (footnote omitted)).

the only acceptable view of section 4 of the ADEA, the exemption is nonetheless permitted under section 9.

II. The Proposed Regulation is Valid According to the Requirements of the APA

AARP also challenges the EEOC's proposed regulation under the APA. According to the APA, we must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); *N.J. Coal. for Fair Broad. v. F.C.C.*, 574 F.2d 1119, 1125 (3d Cir. 1978) . This test asks us to "focus[ ] on the agency's decision making process, not on the decision itself." *NVE Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 190 (3d Cir. 2006) (emphasis omitted).

AARP first asserts that the EEOC acted arbitrarily by disregarding its own regulation, 29 C.F.R. § 1627.15(b), which states that its exemption authority under the ADEA "will be exercised with caution and due regard for the remedial purpose of the statute." *Id.* Because we have found that the proposed regulation, being narrowly drawn to meet the goals of the ADEA and being in the public interest, is expressly authorized by the ADEA, this argument is unavailing. The EEOC has shown the regulation to be reasonable, necessary, and proper according to the terms and purposes of the statute. Therefore, there is no question that the EEOC has exercised due regard for the purposes of the ADEA according to the requirements of 29 C.F.R. § 1627.15(b). For the same reasons, AARP's argument that the proposed regulation exceeds the EEOC's authority because it addresses health care policy is equally without merit.

AARP's argument that the proposed regulation is arbitrary and capricious because it represents a change in agency policy is unsupported by existing law. Although it is "well-established that an agency

may not depart from 'established precedent without announcing a principled reason for such a reversal,'" *Fertilizer Institute v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998) (quoting *Donovan v. Adams Steel Erection, Inc.*, 766 F. 2d 804, 807 (3d Cir. 1985)), a change in agency policy supported by "a reasoned analysis for the change" is not arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Inc. Co.*, 463 U.S. 29, 40-42, 103 S.Ct. 2856, 77 L. Ed 2d 443 (1983). In the notice of proposed rulemaking, the EEOC set forth its reasons for adopting the new exemption, and indicated that the regulation is intended to respond to the unintended negative effects of its prior approach: namely, that employers have chosen to terminate retiree benefits rather than adhere to a standard that has proven too costly to sustain. 68 Fed. Reg. at 41,542-43. The EEOC's review of available material and careful explanation of its reasoning on this point demonstrates that its change in policy is neither arbitrary nor capricious.

In addition, AARP claims that the EEOC acted arbitrarily by failing to consider all relevant factors and possible alternatives in proposing the exemption. AARP claims that the EEOC did not fully consider that a number of employers offer full health benefits to all retirees. In the notice of proposed regulation, however, the EEOC indicated a number of relevant studies and applicable statistics to support its reasoning on this point.[18/] Relying substantially on

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[18/] The EEOC cited, for example, an outside report that estimated "a 15 percent decline in the number of large employers providing preage 65 retiree health coverage between 1991 and 2000 and an 18 percent decrease in the number of large employers providing health benefits to retirees age 65 or older during the same period." 68 Fed. Reg. at 41,544 (citing Hewitt Associates LLC, *Trends in Retiree Health Plans* (2001)).

these reports,[19] the EEOC concluded that the proposed exemption is necessary to counteract the effects of rising health care costs and to encourage employers to provide retiree health benefits to the greatest possible extent. *Id.* at 41,542, 41,544. Similarly, AARP's assertion that the EEOC failed to consider the potential effect on all workers, particularly retirees over the age of sixty-five, is contradicted by the EEOC's explanations accompanying the proposed regulation. The EEOC recognized that "many retirees in this age group rely on employer-sponsored benefits," and that such programs are "valuable benefit[s] for older persons [and] should be protected and preserved." *Id.* at 41,544. The EEOC determined that the proposed exemption would be in the interests of all retirees, "permit[ting] employers to provide a valuable benefit to early retirees who otherwise might not be able to afford health insurance coverage and allow[ing] employers to provide valuable supplemental health benefits to retirees who are eligible for Medicare." *Id.* at 41,547. AARP's claim that the EEOC failed to consider possible alternatives, specifically the "equal cost equal benefit" provision in section 4 of the ADEA, also fails. The EEOC considered, at length, whether the "equal cost equal benefit" provision would be sufficient to address the problem of declining retiree health benefits, and concluded as a policy matter that relying solely on this approach would be impractical or impossible. *Id.* at 41,544-46. Therefore, it is clear that the EEOC's proposed regulation was supported by the agency's full consideration of the relevant factors,

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[19] While the EEOC never initiated its own, independent survey of healthcare providers, the "failure to conduct [an] independent study [is] not violative of [the] APA because notice and comment procedures 'permit parties to bring relevant information quickly to the agency's attention.'" *Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n*, 412 F.3d 133, 142 (D.C. Cir. 2005) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1124 (D.C. Cir. 1984)).

potential effects, and possible alternatives to such a policy, and was not arbitrary or capricious.

Finally, AARP challenges the regulation based on the notice and comment requirements of the APA, asserting that the proposed regulation was based on comments and information that were not publicly available during the notice and comment period. The plain language of section 553 of the APA fails to support this claim. For notice and comment rulemaking, as here, the APA requires only "[g]eneral notice of proposed rule making . . . in the Federal Register," including "either the terms or substance of the proposed rule," and "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). Here, the EEOC provided general notice of the proposed rulemaking, including the terms of the rule and a lengthy explanation of its rationale, and provided an opportunity for interested parties to participate in the rulemaking through the submission of comments. 68 Fed. Reg. at 41,542, 41,548-49. Therefore, the EEOC fulfilled the requirements of section 553.

In addition, an agency is not required to disclose all informal contacts related to the issue addressed in a notice and comment rulemaking, "so long as [the contacts] do not frustrate judicial review or raise serious questions of fairness." *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 57 (D.C. Cir. 1977). The EEOC has acknowledged the informal communications being challenged by AARP for the purposes of judicial review, and noted that the communications took place well before official notice of the rulemaking. These contacts therefore do not frustrate judicial review or raise questions of fairness. Because the EEOC adhered to the notice and comment requirements of the APA and did not engage in improper communications with respect to the rulemaking, the proposed regulation is valid under the APA.

For the foregoing reasons, the proposed regulation is within the EEOC's authority under the ADEA and valid according to the requirements of the APA.

CONCLUSION

For the reasons stated above, we will AFFIRM the District Court's order dated September 27, 2005, granting the EEOC's Motion for Relief from Judgment, vacating the District Court's prior order dated March 30, 2005, and lifting the injunction of the implementation of the proposed regulation.

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA.

Sept. 27, 2005

No. 05-CV-509

AARP, et al.,

Plaintiffs,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant.

Christopher G. Mackaronis, Brickfield, Burchette Ritts & Stone, P.C., Laurie A. McCann, AARP Foundation Litigation, Michael J. Schrier, Bell Boyd & Lloyd, PLLC, Washington, DC, Stephen G. Console, Console Law Office LLC, Philadelphia, PA, *for Plaintiffs.*

Gillian Flory, Henry A. Azar, Jr., Jacqueline Eloine Coleman, Jennifer R. Rivera, U.S. Department of Justice, Douglas L. Greenfield, Bredhoff & Kaiser PLLC, Ann Elizabeth Reesman, Daniel Yager, McGuiness Norris & Williams LLP, Washington, DC, Joan K. Garner, U.S. Attorney's Office, Daniel P. O'Meara, Montgomery McCracken Walker & Rhoads, LLP, Philadelphia, PA, *for Defendant.*

MEMORANDUM AND ORDER
ANITA B. BRODY, District Judge

I. INTRODUCTION

In this suit under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"), the AARP challenges a regulation proposed by the Equal Employment Opportunity Commission (the "EEOC"). The proposed regulation would exempt certain employer practices from the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), as amended by the Older Workers Benefit Protection Act, Pub. L. No. 101-433 (1990) (the "OWBPA").[20] Before me is the EEOC's motion to vacate this Court's Order of March 30, 2005, granting summary judgment to plaintiffs AARP, et al. (collectively referred to as "the AARP"). *AARP v. EEOC*, 383 F. Supp. 2d 705, 2005 WL 723991 (E.D. Pa. Mar. 30, 2005)("*AARP I*"). EEOC moves for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), citing an intervening change in law as a result of the Supreme Court's recent decision in *National Cable and Telecommunications Association v. Brand X Internet Services*, — U.S. —, 125 S.Ct. 2688, 162 L. Ed. 2d 820 (2005). For the reasons set forth below, I will grant Defendant's motion.

II. BACKGROUND

On March 30, 2005, I permanently enjoined the EEOC from publishing or otherwise implementing a "Proposed Rulemaking"[21] that would exempt from the prohibitions of the ADEA "the practice of altering, reducing, or eliminating employer-sponsored retiree

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[20] The EEOC is the agency charged with implementing the ADEA. *See* 29 U.S.C. § 628.

[21] As in my earlier opinion, I note that the parties have used the words "rule," "regulation," and "exemption" interchangeably to refer to the regulation at issue, and I do the same. *See AARP I*, 2005 WL 723991, at *1 n.1.

health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program."[22] 68 Fed. Reg. 41542, 41542 (July 14, 2003); *AARP I*, 2005 WL 723991, at *6. Applying the test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed 2d 694 (1984), I held that the challenged regulation was contrary to law and Congressional intent under the ADEA and its amendments. *AARP I*, 2005 WL 723991, at *6. In so holding, I expressly noted that I was bound by the Third Circuit's decision in *Erie County Retirees Association v. County of Erie*, 220 F. 3d 193 (3d Cir. 2000), and that *Erie County* required my conclusion that the regulation failed the first step of the *Chevron* test.

The EEOC filed a notice of appeal on May 31, 2005. On June 27, 2005, while the appeal was still pending, the U.S. Supreme Court decided *National Cable and Telecommunications Association v. Brand X Internet Services*, — U.S. — , 125 S.Ct. 2688, 162 L. Ed. 2d 820 (2005) ("*Brand X*"), which dramatically altered the respective roles of courts and agencies under *Chevron*. *Brand X* held that a court's interpretation of a statute only bars an agency from interpreting that statute differently from the court if the court has determined the *only permissible* meaning of the statute. *See Brand X*, 125 S.Ct. at

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[22] This exemption had the support of various amici curiae, representing both industry and labor. (*See* Br. Amici Curiae of the Equal Employment Advisory Council, HR Policy Association, America's Health Insurance Plans, American Benefits Council, the Chamber of Commerce of the United States, the ERISA Industry Committee, National Rural Electric Cooperative Association, and the Society for Human Resource Management; *see also* Br. Amici Curiae of the National Education Association, the American Federation of Teachers, and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.)

2701. Because the Third Circuit's *Erie County* decision did not determine the only permissible meaning of the relevant provisions of the ADEA, under *Brand X*, I am not bound by *Erie County* in reviewing the EEOC's regulation. *Brand X* also clarified the degree of deference due to agency interpretations under *Chevron*, and made it clear that the EEOC's exemption satisfies *Chevron's* two-step test.

Because of the impact of *Brand X* on the continuing validity of my permanent injunction, I gave the EEOC leave to file a motion for relief from judgment pursuant to Rule 60(b). The Third Circuit stayed the appeal and remanded the case to me for consideration of this motion. (Order of 7/14/05). Both parties submitted briefs on whether I should vacate my March 30, 2005 Order in light of *Brand X*, and I now vacate that Order. At this point, there are no genuine issues of material fact with respect to Count I of Plaintiffs' complaint, which alleged that the regulation was "arbitrary, capricious, and not in accordance with law." (Pls.' Compl. at 22.) Because Defendant is entitled to judgment as a matter of law, I will grant summary judgment to Defendant on Count I. Because my March 30, 2005 Order granted summary judgment for Plaintiffs on Count I, it was not necessary to reach Count II, alleging violations of the APA's notice-and-comment requirements. (*Id.*) Because there are no genuine issues of material fact with respect to this count, and Defendant is entitled to judgment as a matter of law, I will also grant summary judgment to Defendant on Count II.

My Order of March 30, 2005 permanently enjoined the EEOC from "publishing or otherwise implementing the regulation at issue in this case," *AARP I*, 2005 WL 723991, at *6, and I now dissolve that injunction. However, because the parties have already indicated their intention to appeal, I will stay the portion of this Order vacating the permanent

injunction, so that the injunction will remain in effect pending appeal.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). It is appropriate to grant a Rule 60(b)(5) motion "when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 116 L. Ed. 2d 867 (1992)). A change in law can also qualify as one of the "other reasons" justifying relief under Rule 60(b)(6). While "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)," *Agostini*, 521 U.S. at 239, 117 S.Ct. 1997, "a supervening change in governing law that calls into question the correctness of the court's judgment may . . . constitute such an extraordinary circumstance justifying the granting of a Rule 60(b) motion." *United States v. Enigwe*, 320 F. Supp. 2d 301, 308 (E.D. Pa. 2004) (internal citations omitted).[23/]

[23/] The EEOC moved for relief from judgment under "Rule 60(b)." (Def.'s Mot. Rel. J. at 1.) While the EEOC only addressed Rule

Thus, I must determine whether the change in governing law occasioned by the Supreme Court's *Brand X* decision has "call[ed] into question the correctness" of my earlier injunction, *id.* or made it "no longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5). I will begin by summarizing my earlier opinion and the Supreme Court's decision in *Brand X*, and then analyze the effect of *Brand X* on the legal basis for my *AARP I* decision.

IV. DISCUSSION

A. *Earlier Opinion*

The AARP brought suit to enjoin the EEOC from implementing a rule that would permit employers who provide healthcare benefits to retired employees to decrease those benefits when employees become eligible for Medicare. *AARP I*, 2005 WL 723991, at *1. The AARP argued that the regulation violated section 4(a)(1) of the ADEA,[24/] and was thus "arbitrary, capricious, an abuse of discretion, or

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60(b)(6) in its accompanying memorandum of law, (Def.'s Mem. Supp Mot. Rel. J. at 5), because my earlier ruling had "prospective application" within the meaning of 60(b)(5), I considered that subsection as well. *See In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 841 (10th Cir. 1974) (noting that where motion is timely filed under any of the 60(b) clauses, court is not bound by strict categorization of particular claims). In any event, because *Brand X* is a "supervening change in governing law that calls into question the correctness" of my earlier judgment, *Enigwe*, 320 F. Supp. 2d at 308, the EEOC has also presented "extraordinary circumstances" justifying relief under 60(b)(6). *Id.*

[24/] Section 4(a)(1) forbids, *inter alia*, "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

otherwise not in accordance with law" under the APA, 5 U.S.C. § 706(2). (Pls.' Compl. at 22.) The AARP claimed that the regulation was foreclosed by the Third Circuit's interpretation of section 4(a)(1) in *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). In *Erie County*, the Third Circuit held that the ADEA's prohibitions applied to the practice of coordinating retiree healthcare benefits with Medicare eligibility, and that an employer could not reduce benefits to Medicare-eligible retirees unless it could meet the conditions of the "equal benefit or equal cost" safe harbor of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i).[25] In *AARP I*, while not disputing the holding of *Erie County*,[26] the EEOC claimed that the

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[25] Section 623(f)(2)(B)(i) provides: "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section . . . to observe the terms of a bona fide employee benefit plan . . . where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)."

[26] The EEOC filed an amicus brief in *Erie County* advocating the position the Third Circuit eventually adopted, i.e., that employers should be required to meet the "equal cost or equal benefit" test when reducing retiree health care benefits in response to Medicare eligibility. (Def.'s Mem. Supp. Mot. Rel. J. at 3; Pls.' Opp. Def.'s Mot. Rel. J. at 3 n. 2). However, the EEOC subsequently sought notice and comment on the effects of the *Erie County* decision, through which it learned that many employers were deciding not to cover retirees at all in light of *Erie County*, which was within their rights under the ADEA. *See AARP I*, 2005 WL 723991, at *2. It was in response to these "unintended consequences" of its policy that the EEOC promulgated the exemption at issue here. (Def.'s Reply Supp. Mot. Rel. J. at 3.) If the EEOC has changed its position since *Erie County*, it should not detain us long, since "[a]n initial agency interpretation is not

regulation at issue fell within its authority under section 9 of the ADEA, which gives the EEOC power "to issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter" and "to establish . . . reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628.

Because I was asked to review an administrative agency rule for its consistency with congressional intent, I applied the familiar two-part *Chevron* test to the challenged regulation. *See Chevron*, 467 U.S. at 843, 104 S.Ct. 2778; *Marincas v. Lewis*, 92 F.3d 195, 200 (3d Cir. 1996). The first step of the *Chevron* test asks "whether there is a clear and unambiguous congressional intent concerning the precise question in issue." *Marincas*, 92 F.3d at 200; *see Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. In answering this question, I noted that I did not write on a clean slate, but rather was bound by the Third Circuit's decision in *Erie County* that the ADEA prohibited the employer practice at issue. *AARP I*, 2005 WL 723991, at *3.

In *Erie County*, the Third Circuit analyzed whether Medicare coordination of retiree health benefits constituted "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1); *Erie County*, 220 F. 3d at 208-13. The court looked first to the phrase "terms, conditions, or privileges of employment," which had been defined in the OWBPA to include "all employee benefits." 29 U.S.C. § 630(1); *Erie County*, 220 F. 3d at 209. The court concluded

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instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64, 104 S.Ct. 2778.

that "the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person received from his or her former employer." *Erie County*, 220 F. 3d at 209. Next, the court considered whether Medicare eligibility was an "age-based criterion," and concluded that it was. *Id.* at 210-12. The court next held that the use of the term "older worker" rather than "older employee" in the language of the "equal benefit or equal cost" safe harbor, 29 U.S.C. § 623(f)(2)(B)(i), was not meant to exclude retirees. *Id.* at 215-16. The court thus rejected the argument that Congress had used the term "older worker" to indicate that employers could reduce retiree benefits without meeting "equal benefit or equal cost." *Id.* Finally, the court concluded that none of the ADEA's other safe harbors were applicable. *Id.* at 213-16. Thus, the Third Circuit held that unless an employer could satisfy the "equal benefit or equal cost" test, the ADEA prohibited the practice of reducing retiree health care benefits in response to Medicare eligibility.

Accordingly, when applying step one of the *Chevron* test to the EEOC's proposed exemption of this practice, I concluded that "the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue." *AARP I*, 2005 WL 723991, at *3. I went on to reject the EEOC's argument that section 9 of the ADEA gave it the authority to promulgate the regulation notwithstanding the Third Circuits's decision that Congress intended the ADEA to prohibit the conduct in question. *AARP I*, 2005 LW 723991, at *5-6. Because I found that the EEOC's proposed regulation failed step one, I did not reach step two of the *Chevron* test — whether the regulation is "based on a permissible construction of the statute" such that it is "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 843, 845, 104 S.Ct. 2778. Because I found the regulation at issue to be contrary

to law, I granted summary judgment to Plaintiffs on Count I of their complaint and did not need to reach the other count. *AARP I*, 2005 WL 723991, at *6.

B. *The* Brand X *Decision*

The EEOC appealed, and while the case was pending before the Third Circuit, the Supreme Court decided *Brand X*, which cast grave doubts upon the basis for my ruling in *AARP I*. Like this case, *Brand X* involved the question of when a court's prior interpretation of a statute foreclosed a later, contrary construction by an administrative agency. The *Brand X* decision clarified the respective roles of courts and agencies in two key ways that altered the underpinnings of my *AARP I* decision. First, *Brand X* concluded that "[o]nly a judicial precedent holding *that the statute unambiguously forecloses the agency's interpretation,* and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Brand X*, 125 S.Ct. at 2700 (emphasis added). Put differently, *Brand X* states that the only court decision that forecloses a later, contrary interpretation of a statute by an agency is a decision that determines the *only permissible* reading of the statute, not merely the best of several alternatives. *See id* at 2701.

In addition, *Brand X* clarified the *Chevron* standard itself. In applying *Chevron's* first step to the regulation at issue in *Brand X*, the Supreme Court did not ask merely whether Congress had "spoken to the precise question at issue," *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, but rather "whether *the statute's plain terms* 'directly addres[s] the precise question at issue.'" *Brand X*, 125 S.Ct. at 2702 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778) (emphasis added). Thus, *Brand X* makes it clear that *Chevron* step one focuses on the plain text of the relevant statute to determine whether Congress has spoken. As discussed further below, *Brand X* has established that the relevant

inquiry at *Chevron* step one is the same as for determining whether a court decision will foreclose contrary agency interpretation — whether the statutory text compels only one permissible interpretation.

In *Brand X*, the Supreme Court considered Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, which defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46); *Brand X*, 125 S.Ct. at 2697. *Brand X* involved a Declaratory Ruling[27] by the Federal Communications Commission (the "FCC") that cable companies providing cable modem Internet service were not providing "telecommunications service," but rather "information service," and were thus exempt from certain common-carrier regulations. *Id.* at 2697-98. Numerous parties challenged the FCC's ruling, arguing that "telecommunications service" as used in the Communications Act includes cable modem service. *Id.* at 2698.

The Ninth Circuit vacated the FCC regulation insofar as it concluded that cable modem service was not telecommunications service. *Brand X Internet Serv. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (*"Brand X v. FCC"*). In vacating the FCC regulation, the Ninth Circuit relied on its earlier decision in *AT&T v. City of Portland*, 216 F.3d 871 (2000), a case that did not involve the application of *Chevron* deference. *See Portland*, 216 F.3d at 876. In *Portland*, the Ninth Circuit had determined that the Communications Act included cable modem service in the definition of "telecommunications service." *Id.* at 878. Because the Ninth Circuit considered itself bound by *stare decisis*

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[27] Section 554(e) of the APA provides that an agency, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e).

to follow *Portland's* construction of the Communications Act, it did not even apply *Chevron* to the FCC regulation at issue in *Brand X*, but instead vacated it solely on the authority of *Portland*. *See Brand X v. FCC*, 345 F.3d at 1132. In so holding, the Ninth Circuit relied heavily on language from the Supreme Court's decision in *Neal v. United States*, 516 U.S. 284, 116 S.Ct. 763, 133 L.Ed. 2d 709 (1996):

> Once [a court] has determined a statute's meaning, the court must adhere to that prior ruling under the doctrine of *stare decisis* and assess an agency's later interpretation of the statute against that settled law.

Brand X v. FCC, 345 F.3d at 1132-33 (quoting *Neal*, 516 U.S. at 294, 116 S.Ct. 763).

On certiorari, the Supreme Court reversed the Ninth Circuit and upheld the challenged FCC regulation. The Court held that the Ninth Circuit had erred in following its ruling in *Portland* rather than affording the challenged regulation *Chevron* deference, because "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 125 S.Ct. at 2700. The Court derived this principle from *Chevron* itself and its underlying premise that "it is for agencies, not courts, to fill statutory gaps." *Id.* (citing *Chevron*, 843-44 and n.11, 104 S.Ct. 2778). Turning to the Ninth Circuit's *Portland* decision, the Court concluded that "[n]othing in *Portland* held that the Communications Act unambiguously required treating cable Internet providers as telecommunications carriers." *Id.* To the contrary, the Court concluded:

> *Portland* held only that the *best* reading of [the Act] was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute.

Id. (emphasis in original). Because *Portland* did not hold that its particular interpretation of the statute was the "only permissible" construction, rather than merely "the best," the Court determined that *Portland* could not control the Ninth Circuit's review of the FCC regulation. Rather, the Court concluded, the Ninth Circuit should have afforded the regulation *Chevron* deference.[28]

Finally, the Supreme Court itself applied the *Chevron* test to the challenged FCC regulation. Under the first step, it considered "whether the [Communications Act's] plain terms 'directly addres[s] the precise question at issue.'" *Brand X*, 125 S.Ct. at 2702 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). The Court considered the "precise question" to be "whether cable companies providing cable modem service are providing a 'telecommunications service' . . . ." *Id.* at 2702-03. The Court concluded that because the word "offering" as used in the Communications Act did not unambiguously dictate one particular interpretation of the statute, the FCC regulation

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[28] In so holding, the Supreme Court limited its prior decision in *Neal v. United States*, a case on which I expressly relied in my *AARP I* opinion. The Court stated that the Ninth Circuit's reliance on *Neal* was misplaced, and that *Neal* does not stand for the proposition that a "prior judicial construction of a statute categorically controls an agency's contrary construction." *Brand X*, 125 S.Ct. at 2701. The Court distinguished *Neal* by characterizing *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed. 2d 524 (1991), the case on which it had relied in *Neal*, as holding that the relevant statute was in fact unambiguous. *Id.*

passed *Chevron's* first step. *Id.* at 2704. Finally, the Court found that the FCC's rule was a "reasonable policy choice for the agency to make," thus satisfying *Chevron's* second step. *Id.* at 2708 (quoting *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). Accordingly, the Court reversed the Ninth Circuit and upheld the challenged regulation. *Id.* at 2712.

C. *The Effect of* Brand X *on My Holding in* AARP I

As already stated, *Brand X* has cast grave doubts on the legal basis for my ruling in *AARP I*. The Ninth Circuit's *Brand X* decision, which the Supreme Court ultimately reversed, was in many ways parallel to my own decision in *AARP I*. Just as the Ninth Circuit relied on the *stare decisis* effect of *Portland* in striking down the regulation at issue, I relied on the precedential value of the Third Circuit's *Erie County* decision. Moreover, to justify my reliance on *Erie County*, I quoted the very same language from *Neal* that the Ninth Circuit cited in *Brand X*, *see AARP I*, 2005 WL 723991, at *3; *Brand X v. FCC*, 345 F.3d at 1132-33, and which the Supreme Court concluded the Ninth Circuit had relied on erroneously. *See Brand X*, 125 S.Ct. at 2701. Although, unlike the Ninth Circuit, I did apply the *Chevron* test to the agency regulation at issue, *Brand X* did not merely command the lower courts to apply *Chevron* rather than their own circuit's precedents. Rather, *Brand X* stands for the broader proposition that a prior court interpretation of a statute cannot trump a subsequent agency interpretation unless the court holds that its interpretation is the *only permissible*, not merely *the best*, construction of the statute. *See Brand X*, 125 S.Ct. at 2701.

In *AARP I*, I concluded that I was bound by the Third Circuit's decision in *Erie County* to hold that the EEOC's proposed rule violated the ADEA:

> In this case I will not reach the second step of *Chevron* because the Third Circuit has already determined that Congress has expressed a clear and unambiguous intent with regard to the precise question at issue. *AARP I*, at *3.

However, *Brand X* has established a considerably more stringent standard for when a construction can be said to "follo[w] from the unambiguous terms of the statute." *Brand X*, 125 S.Ct. at 2700. Crucially, *Brand X* makes it clear that where a court's holding states merely the "best" interpretation of a statute, not the "only permissible" interpretation, the court decision does not foreclose a later, differing agency interpretation. *Id.* at 2701. Because the Third Circuit's opinion in *Erie County* did not hold that it was the only permissible interpretation of the ADEA, it cannot foreclose a contrary interpretation by the EEOC.

D. *The Holding of* Erie County

Brand X requires a closer reading of the *Erie County* decision than was necessary in *AARP I*, and this close reading demonstrates that *Erie County's* interpretation of section 4(a)(1) is only the best of several alternatives: it is not the "only permissible" interpretation within the meaning of *Brand X*. First of all, *Erie County* does not explicitly state that its holding is the "only permissible reading of the statute." Indeed, in its discussion of whether defendants could satisfy the "reasonable factors other than age" safe harbor, the *Erie County* court seems to acknowledge that its decision is not the only possible interpretation: "While *it is possible* that Congress intended Medicare eligibility to be a 'reasonable factor other than age,' we believe *it is more likely* that Congress would have drafted a specific provision addressing the issue . . . " *Erie County*, 220 F.3d at 214 (emphasis added). It is understandable that the Third Circuit would not have

stated that its interpretation was the only one permitted by the statute's plain language, because prior to *Brand X* there was no reason to do so. However, where the court did make a plain-language determination of an issue, it stated so explicitly: "[T]he *plain language* of section 623(f)(2)(B)(i) [the 'equal benefit or equal cost' safe harbor]. . .indicates that Congress intended [it] to apply when an employer reduces health benefits based on Medicare eligibility." *Id.* at 215 (emphasis added). Thus, it is relevant that *Erie County* does not state that its ultimate conclusion is inescapably dictated by the ADEA's plain language. Because the *Erie County* opinion does not expressly state whether it determined the only permissible reading of the statute, rather than merely the best reading, it is appropriate to analyze the opinion's reasoning.

At the outset of its analysis, the Third Circuit states that it is "left with a rather difficult task of statutory interpretation in this case." *Erie County*, 220 F.3d at 208. The court's own characterization of its interpretive task as "difficult" would seem to undermine the notion that the statutory text compels a single interpretation. Moreover, the *Erie County* opinion points to inherent ambiguities in the statutory text. It is true that the court states at one point that "the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer." *Id.* at 209. However, in the next paragraph, the court indicates ambiguities in the word "employee." After noting that the ADEA's definition of the term "employee" is the same as that of Title VII of the Civil Rights Act of 1964, the Third Circuit draws an analogy to the Supreme Court's interpretation of the Title VII definition of "employee" in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed. 2d 808 (1997). There, as the Third Circuit notes, the Supreme Court "found the term 'employees' to be '*ambiguous* as to whether it excludes

former employees' . . . then construed this *ambiguity* in favor of Title VII's broad remedial purposes." *Erie County*, 220 F.3d at 209 (quoting *Robinson*, 519 U.S. at 341, 345-46, 117 S.Ct. 843) (emphasis added). The *Erie County* court's reliance on *Robinson*, a case which expressly found the term "employee" to be ambiguous in an analogous context, seems to indicate that the term "employee" as used in the ADEA is open to more than one possible interpretation.

The *Erie County* court also recognized ambiguity in the use of the term "older worker" rather than "older employee" in the ADEA's "equal benefit or equal cost" safe harbor. That provision states that it only applies if "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . . . " 29 U.S.C. § 623(f)(2)(B)(i). The Third Circuit noted that "our analysis is complicated by the presence of the term 'older worker' . . . [I]t is unclear why Congress made this change or what significance it was supposed to have." *Erie County*, 220 F.3d at 215. While the court ultimately concluded that Congress did not intend the phrase "older worker" to exclude retirees, this additional layer of ambiguity in the statute further demonstrates that the *Erie County* decision did not determine the only possible interpretation of the ADEA.

Another indication that *Erie County* did not focus solely on the unambiguous terms of the statute is the court's extended discussion of contradictory legislative history. The *Erie County* court notes that "while the legislative history may provide assistance in resolving *ambiguity*, the language of the statute must guide us in the first instance," thereby invoking the canon of statutory interpretation that where a statute's meaning is plain on its face, legislative history cannot be introduced to contradict it. *Erie County*, 220 F.3d at 209 (citing *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 444 (3d Cir. 1996)); *see United*

States v. Gonzales, 520 U.S. 1, 6, 117 S.Ct. 1032, 137 L. Ed. 2d 132 (1997) (where statutory command is straightforward, there is no reason to resort to legislative history); *Scafar Contracting, Inc. v. Sec'y of Labor*, 325 F.3d 422, 425-26 (3d Cir. 2003) (court looks to legislative history only if statutory text is ambiguous). Under this canon, the court could only consider legislative history if there were some ambiguity in the statutory text. Thus, the fact that the *Erie County* court examined legislative history in some depth indicates that the statutory text does not dictate only one permissible reading.

Not only did the Third Circuit discuss at length the legislative history of the amendments made to the ADEA by the OWBPA, *see* 220 F.3d at 203-08, the court recognized that even the legislative history itself was ambiguous on the relevant question:

> We recognize that there are statements in the legislative history of the OWBPA which indicate that certain members of Congress viewed the ADEA as inapplicable to retirees except when a retiree's benefits are 'discriminatorily structured prior to retirement.'

Id. at 210. The Court went on to conclude that this legislative history was not reflected int he text of the ADEA. *Erie County*, 220 F.3d at 210, 214. However, while in this instance, the court rejected an argument from legislative history by pointing to the statute's text, elsewhere the court supports its rejection of an admittedly plausible reading of the statute by reference to legislative history:

> In reaching this conclusion [that the "reasonable factors other than age" safe harbor does not apply to Medicare eligibility], we point out that the legislative history we have cited

> demonstrates that when Congress passed the OWBPA it expressly considered the issue of availability of Medicare coverage.

Id. at 214-15. While the court's interpretation seems to be anchored in the statutory text, it is by no means limited to the text, as can be seen from these appeals to legislative history.[29]

This combination of legislative history and statutory text was more than enough for the *Erie County* court to conclude that the "best" interpretation of section 4(a)(1) of the ADEA prohibited the employer practice at issue. However, I cannot conclude that the court, on the basis of admittedly ambiguous statutory language, admittedly contradictory legislative history, and an admittedly "difficult task of statutory interpretation," could have reached the *only possible* interpretation of the statute. Because that is what *Brand X* demands of *Erie County*'s holding in order for it to foreclose a later, conflicting interpretation of section 4(a)(1) by the EEOC, in light of *Brand X*, *Erie County* no longer forecloses a contrary EEOC interpretation. Thus, as I proceed to the next and final step in my analysis, the application of *Chevron* to the regulation at issue, I write as though on a clean slate.

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[29] The *Erie County* court also made several references to the policies underlying the ADEA. *See* 220 F.3d at 216 (noting that "it makes good sense and furthers Congress' intent to apply the equal benefit or equal cost principle in this case"); *id.* (noting that its interpretation "strikes a fair middle ground between the interest of the employer and the interests of older retirees.") Like its arguments from legislative history, the court's appeals to general congressional intent and the balancing of competing policy considerations would seem unnecessary if its decision were the only permissible construction of the statute.

E. *Application of* Chevron *To The EEOC Regulation*

As in *AARP I*, I must now apply the two-step test of *Chevron* to the challenged regulation. However, whereas in my earlier opinion I was bound by the Third Circuit's holding in *Erie County* to find that the regulation failed the first step, now the Supreme Court's decision in *Brand X* has made it clear that I am not bound by *Erie County*'s interpretation of the ADEA in reviewing the EEOC's construction.

Chevron directs a court reviewing an agency regulation to first address congressional intent concerning the precise question in issue. *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778; *Marincas*, 92 F.3d at 200. In addition to clarifying the relationship between *Chevron* deference and reliance on prior court precedent, *Brand X* also impacted the *Chevron* step one standard itself. In applying *Chevron* to the regulation at issue in *Brand X*, the Supreme Court did not ask only whether Congress had "spoken to the precise question at issue," *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, but rather "whether *the statute's plain terms* 'directly addres[s] the precise question at issue.'" *Brand X*, 125 S.Ct. at 2702 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778) (emphasis added). Thus, *Brand X* makes it clear that *Chevron* step one focuses on the plain text of the relevant statute to determine whether Congress has spoken. *Brand X* also makes it clear that the analysis under *Chevron*'s first step is identical to the analysis of whether a prior judicial precedent controls the later regulation:

> The better rule is to hold judicial interpretations contained in precedents to the *same demanding Chevron step one standard that applies if the court is reviewing the agency's construction on a blank slate.*

Brand X, 125 S.Ct. at 2700 (emphasis added). Thus, in both analyses, a court must look to whether the plain text of the statute compels only one permissible interpretation. If the court concludes that there is only one permissible meaning of the statute, then "that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

1. *Chevron Step One*

In order to determine whether Congress has spoken unambiguously to the question, I must first ascertain what the applicable "question" is. In *AARP I*, my analysis of *Chevron* step one concluded that "Congress intended for the ADEA to prohibit the practice of coordinating employer-provided retiree health benefits with Medicare eligibility unless the employer could meet the equal cost or equal benefit analysis." *AARP I*, 2005 WL 723991, at *4. Thus, *AARP I* implicitly framed the "precise question" as "whether the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility." I adopt the same formulation of the relevant question here.

The EEOC argues in its Rule 60(b) motion, as it did in *AARP I*, that this is not the correct question to ask. This is because the EEOC has represented throughout the litigation that *Erie County* was correctly decided, and that the ADEA does prohibit Medicare coordination of retiree healthcare benefits. *AARP I*, 2005 WL 723991, at *5. Nevertheless, the EEOC has argued throughout that it has the power to *exempt* this practice from the prohibitions of the statute under section 9 of the ADEA, 29 U.S.C. § 628, which provides:

> In accordance with the provisions of the subchapter II of chapter 5 of Title 5, the

> Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 628. Because it has conceded that the ADEA prohibits coordinating retiree benefits with Medicare eligibility, the EEOC argues that the "precise question" for *Chevron* step one purposes is "whether Section 9 authorizes the EEOC to issue exemptions, and, if so, whether the EEOC properly determined here that exempting the practice of coordinating retiree health benefits with Medicare eligibility is 'necessary and proper in the public interest.'" (Def.'s Mem. Supp. Mot. Rel. J. at 8.) Because this formulation of the "precise question" is required by neither *Chevron* nor *Brand X* and would give the EEOC unfettered discretion to issue regulations that contravene the intent of Congress, I decline to adopt it.

> (i) The EEOC's formulation of the "precise question"

In *AARP I*, I gave several reasons for rejecting the EEOC's argument that section 9 of the ADEA authorized the EEOC to allow the employer practice at issue, despite the fact that *Erie County* had found the practice to violate the ADEA. *AARP I*, 2005 WL 723991, at *5-6. Because the only change since my earlier opinion is the Supreme Court's decision in *Brand X*, and *Brand X* has done nothing to compel the EEOC's view of how *Chevron* should be applied, I merely expand upon these reasons in rejecting the argument again here.

One key reason that I rejected the EEOC's argument in *AARP I* was that it would allow the EEOC to pass exemptions that contravene express congressional intent.[30] *See AARP I*, 2005 WL 723991,

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[30] In *AARP I*, I also noted that "examining solely the statutory provision that delegates rulemaking authority rather than the ADEA as a whole, the approach the EEOC is advocating, would render meaningless the first step of *Chevron*." *AARP I*, 2005 WL 723991, at *5. The Supreme Court has never decided whether an agency's interpretation of the scope of its own statutory authority is entitled to *Chevron* deference. Compare *Mississippi Power & Light Co., v. Mississippi ex rel. Moore*, 487 U.S. 354, 387, 108 S.Ct. 2428, 101 L. Ed. 2d 322 (1988) (Brennan, J., dissenting) ("[T]his Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.") *with id.* at 381, 108 S.Ct. 2428 (Scalia, J., concurring in the judgment) ("[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."); *see also Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) ("The Supreme Court cannot be said to have resolved the issue definitively."). Likewise, the most recent Third Circuit case to face this question expressly declined to reach it. *See Lancashire Coal Co. v. Sec'y of Labor, Mine Safety & Health Admin.*, 968 F.2d 388, 393 n.4 (3d Cir. 1992) ("We thus avoid the need to reach the question as to when an agency is entitled to deference on issues regarding its own jurisdiction.")

I recognize that statements in two earlier Third Circuit cases, neither of which was cited to me by the parties, seem to indicate that agency interpretations of their own statutory authority may in fact be entitled to deference in some circumstances. *See Air Courier Conference of Am./Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223 (3d Cir. 1992); *Puerto Rico Maritime Shipping Auth., v. Valley Freight Systems, Inc.*, 856 F.2d 546, 552 (3d Cir. 1988). However, no case that I have reviewed commands deference to an agency interpretation that contravenes unambiguous congressional intent. *See Air Courier Conference*, 959 F.2d at 1224 ("Of course, we recognize that judicial deference to an agency's construction of a statute in conflict with the

at *6. The essence of the EEOC's argument is that section 9 would give it the power to exempt the challenged conduct even if the plain language of the ADEA had clearly and unambiguously indicated a congressional intent to forbid it. Yet as I noted in *AARP I*, "[a]n administrative agency, including the EEOC, may not issue regulations, rules or exemptions that go against the intent of Congress." *AARP I*, 2005 WL 723991, at *5. No federal statute or case that I have reviewed authorizes an agency to pass exemptions that contradict unambiguously expressed congressional intent. *See Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 65 L. Ed. 2d 532 (1980) ("We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.").

Thus, the EEOC presents the novel[31] and paradoxical question of whether Congress "intended" section 9 to authorize the EEOC to pass exemptions that override unambiguously expressed congressional intent. Such a sweeping interpretation of the EEOC's power would seem to be, in effect, a congressional delegation to the EEOC of the power to partially repeal

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statute's plain meaning would be inappropriate.'")

[31] Prior to this case, the EEOC has passed only one "exemption" under section 9—allowing non-EEOC supervised waivers of claims under the ADEA—and because that exemption did not lead to any litigation, the question of the EEOC's authority to issue exemptions under section 9 has never been squarely presented to a court. (Tr. 3/18/05 at 12-13).

portions of the ADEA—a delegation that might very well violate the separation of powers doctrine. Article I, section 1 of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States" and "permits no delegation of those powers." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472, 121 S.Ct. 903 149 L. Ed. 2d 1 (2001). Moreover, "repeal of statutes, no less than enactment, must comport with Article I." *Clinton v. City of New York*, 524 U.S. 417, 438, 118 S.Ct. 2091, 141 L. Ed. 2d 393 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 954, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)). Although the Supreme Court has not invalidated a Congressional grant of authority to an agency under the "nondelegation" doctrine since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), the interpretation of section 9 advocated by the EEOC veers close to the constitutional limit.[32/]

It is true that Congress need only give an agency an "intelligible principle" upon which to regulate in order to satisfy the nondelegation doctrine. *Whitman*, 531 U.S. at 472, 121 S.Ct. 903. It is also true that many statutes authorizing regulation "in the public interest" have been upheld as laying down a sufficiently "intelligible principle." *See e.g., Nat'l Broad, Co., Inc. v. United States*, 319 U.S. 190, 225-26, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (upholding delegation to FCC of authority to regulate airwaves "as public convenience, interest, or necessity requires").

[32/] Absent a clear statement from Congress, courts are reluctant to follow agency interpretations of statutes that would push the constitutional limits of congressional authority. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001).

However, neither the parties nor this Court has found any case that sanctions congressional delegation to an agency of the authority to undo what Congress has done through clear and unambiguous statutory language.[33/] While the nondelegation cases establish that Congress may leave wide statutory gaps to be filled by agencies, an agency has no authority to regulate where a statutory provision "unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill . . ." *Brand X*, 125 S.Ct. at 2700.

However, this case does not present the difficult question of whether the EEOC can promulgate an exemption under section 9 of the ADEA that contradicts the unambiguously expressed intent of Congress. This is because, as set forth fully below, Congress did not express a clear and unambiguous intent to prohibit Medicare coordination of retiree health benefits in the ADEA. Indeed, under *Brand X*, there is a gap in the ADEA with respect to whether it applies to retiree benefits at all, because *Erie County*'s conclusion that it does is not the "only permissible" construction of the statute. As I noted in my earlier opinion, "[t]he EEOC has the power to issue rules, regulations and exemptions within these explicit, or

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[33/] Nor could the EEOC avoid this nondelegation problem through its self-imposed requirement that exemptions under section 9 be exercised "with caution and due regard for the remedial purpose of the statute" and only upon a "a strong and affirmative showing" that the exemption is necessary and proper in the public interest. 29 C.F.R. § 1627.15. As the Supreme Court has said, "[t]he very idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Whitman*, 531 U.S. at 473, 121 S.Ct. 903.

implicit, gaps that Congress left in the ADEA."[34] *AARP I*, 2005 WL 723991, at *6. Thus, because there is a gap in the statute, the EEOC could promulgate a rule that interpreted the ADEA not to apply to *any* retiree benefits, although it has clearly stated that it has not intention to do so. Since retiree healthcare benefits are merely a subset of a class of benefits that the EEOC could theoretically exclude from the protections of the ADEA, the EEOC's exemption of Medicare coordination of healthcare benefits is both a "permissible construction of the statute" and a "reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 843, 845, 104 S.Ct. 2778.

This interpretation of the EEOC's authority to exempt under section 9 of the ADEA has at least two strengths. First, it avoids the potential constitutional problems with the EEOC's interpretation, consistent with the doctrine of constitutional avoidance. *See Clark v. Martinez*, *— U.S. —*, 125 S.Ct. 716, 724, 160 L.Ed.2d 734 (2005)("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . "); *United States v. Navarro*, 145 F.3d 580, 589 (3d Cir. 1998) (courts generally avoid statutory constructions that raise doubtful constitutional questions). Indeed, the Supreme Court has often avoided nondelegation questions by interpreting statutes narrowly. *See, e.g. Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-41, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (construing FCC assessment as a "fee" rather than a "tax" to avoid question of whether Congress unconstitutionally delegated taxing power to agency);

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[34] Plaintiffs themselves admit that "[i]f there is a 'gap' in the statute, the agency can regulate so long as the regulation is not arbitrary, capricious, or otherwise contrary to law." (Pls.' Reply Supp. Mot. Prelim Inj. at 4.)

Kent v. Dulles, 357 U.S. 116, 129-30, 78 S.Ct. 1113, 2 L.Ed. 2d 1204 (1958) (construing delegation to Secretary of State of power to issue passports to exclude power to deny on basis of political beliefs). Restricting the EEOC's section 9 exemption power to circumstances in which Congress has left a gap in the ADEA provides a limiting principle that avoids a nondelegation problem. An additional strength of this reading of section 9 is that it addresses the EEOC's argument that an adequate interpretation of the provision must not render the exemption clause superfluous. *See AARP I*, 2005 WL 723991, at *5. Under the interpretation adopted here, the EEOC is free to issue exemptions in the "gaps" where Congress has not unambiguously foreclosed agency interpretation — so long as those exemptions are "necessary and proper in the public interest," 29 U.S.C. § 628, and satisfy the second step of *Chevron*.

(ii) *The AARP's argument that the EEOC has conceded Chevron step one*

As a last step before evaluating the regulation at issue under the *Chevron* test, I will address the AARP's argument, that the EEOC has conceded that its exemption fails *Chevron* step one. The AARP argues that since the relevant question for *Chevron's* first step is "whether the ADEA prohibits the challenged employer practice," and the EEOC does not interpret the ADEA to allow the practice, this Court's *Chevron* inquiry is at an end. (Pls.' Opp. Def.'s Mot. Rel. J. at 3 n. 2) However, *Brand X* established that the relevant question under *Chevron* step one is whether the statute's plain terms compel only one permissible interpretation. Crucially, the EEOC has never conceded that *Erie County* held that the only permissible interpretation of section 4(a)(1) forbids the conduct at issue. It is true that in *AARP I*, I stated that "[t]he EEOC does not dispute the holding of *Erie County*, that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with

Medicare eligibility." *AARP I*, 2005 WL 723991, at *5. However, this characterization of the EEOC's position was made before *Brand X* changed the definition of a "plain-language" holding in the context of the *Chevron* framework. As discussed at length above, *Erie County* did not hold that the ADEA's "plain language" forbid the practice at issue because, under *Brand X*, it did not state only one permissible interpretation of the statute, rather than merely the best interpretation.

Subsequent to the *Brand X* decision, far from conceding that *Erie County*'s holding followed from the unambiguous terms of the ADEA, the EEOC has argued that *Erie County* "was not a plain language decision on the central issue of whether an employer violated the ADEA by [coordinating health benefits with Medicare eligibility]." (Def.'s Mem. Supp. Mot. Rel. J. at 8). Nowhere has the EEOC admitted that there is only one permissible reading of section 4(a)(1) that unambiguously forbids the conduct at issue. Under *Brand X* and *Chevron*, if there is more than one permissible reading of the statute, then there is a statutory gap that an agency is entitled to fill with any "permissible construction." *Chevron*, 467 U.S. at 843. Because there is more than one permissible interpretation of section 4(a)(1), it leaves such a gap, and the EEOC is entitled to fill it with any reasonable regulation.

(iii) The regulation passes Chevron step one

Having determined the relevant "precise question" for *Chevron* step one, I must now apply the first step of *Chevron* to the EEOC's proposed regulation. In determining whether *Erie County* foreclosed a contrary interpretation of section 4(a)(1) of the ADEA by the EEOC, *Brand X* required me to ask whether *Erie County*'s interpretation of the statute "follow[ed] from the unambiguous terms of the statute" such that it was the *only permissible* reading of section 4(a)(1). *Brand X*, 125 S.Ct. at 2700-01.

Since, as discussed above, *Brand X* establishes that exactly the same standard should apply in *Chevron* step one, *see id.* at 2701, I must now make an independent determination of whether a construction of section 4(a)(1) that contradicts the EEOC's interpretation is the *only permissible* reading of the statute.

However, having already concluded that *Erie County* did not hold that the plain text of section 4(a)(1) compels only one permissible interpretation, I do not now go where the Third Circuit did not venture. Given the inherent ambiguities in the statutory language, the conflicting legislative history, and the various opposing policy arguments underlying section 4(a)(1), the plain language of the provision cannot be said to unambiguously foreclose the EEOC's exemption. Thus, because Congress had not "spoken to the precise question at issue" in the plain terms of the ADEA, the EEOC's proposed exemption satisfies *Chevron* step one. *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778; *Brand X*, 125 S.Ct. at 2702.

2. *Chevron Step Two*

I come now to step two of the *Chevron* test, which asks whether the regulation is "based on a permissible construction of the statute" such that it is a "reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 843, 845, 104 S.Ct. 2778. This test has been described as one of "reasonableness," *Chen v. Ashcroft*, 381 F.3d 221, 224 (3d Cir. 2004) (citing *Chevron*, 467 U.S. at 845, 865, 866, 104 S.Ct. 2778), under which "the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household Credit Serv., Inc. v. Pfenning*, 541 U.S. 232, 239, 124 S.Ct. 1741, 158 L.Ed. 2d 450 (2004) (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778).

The earlier part of this opinion detailed how neither the *Erie County* decision nor the plain text of section 4(a)(1) clearly and unambiguously established that the ADEA applies to retiree benefits at all or that it prohibits Medicare coordination of retiree health benefits. Though the Third Circuit's interpretation in *Erie County* may indeed be the *best* reading of the statute, it is not the only permissible reading within the meaning of *Brand X*. Thus, even if the EEOC had proposed a regulation that interpreted the ADEA's protections not to apply to retiree benefits at all, I would be compelled to find it "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. However, the EEOC's has chosen instead to maintain that the ADEA does apply to retiree benefits generally, while specifically exempting the practice of Medicare coordination of health benefits. *See* 68 Fed. Reg. at 41547 ("No other aspects of ADEA coverage or benefits other than retiree health benefits are affected by this exemption."). Thus, the question becomes whether this is a reasonable way for the EEOC to fill the gap that Congress has left in the ADEA. I conclude that it is.

Erie County's reading of section 4(a)(1) of the ADEA—that it applies to retiree benefits generally and prohibits Medicare coordination of retiree healthcare benefits—is not the "only permissible" construction of the ADEA. Thus, the EEOC has the flexibility to decide whether retiree benefits are covered by the Act at all. Section 9 of the ADEA, which allows the EEOC to "establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest," 29 U.S.C. § 628, gives the EEOC power to "deregulate," or forbear from exercising its regulatory authority, when the public interest requires. *Compare* 47 U.S.C. § 160(a) (providing that the FCC "shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service" where enforcement is not

necessary and forbearance is in the public interest). Taken together, section 4(a)(1) and section 9 allow the EEOC to interpret the ADEA to cover retiree benefits generally while exempting the practice of Medicare coordination of health benefits. In limiting its exemption to healthcare benefits, the EEOC is merely interpreting section 4(a)(1) of the ADEA to apply to retiree benefits (which is within its authority to do), while at the same time forbearing from exercising its regulatory authority with respect to a *subset* of retiree benefits (which section 9 allows it to do).[35/]

Two well-recognized canons of statutory interpretation guide this reading of the interaction between section 4(a)(1) and section 9 of the ADEA: the canon that statutes are to be interpreted so as not to render any provision superfluous and the canon of constitutional avoidance. The interpretation set forth here gives content to the exemption clause of section 9, by reading it to allow the EEOC to exempt any employer conduct within its sphere of regulatory authority, i.e., where there is a gap in the statute. At the same time, this reading forbids the EEOC from stepping outside this permissible regulatory sphere in its exercise of section 9 exemption power, and thus avoids a thorny nondelegation issue. Another consideration that guides this interpretation is the Supreme Court's recent admonition in *Brand X* that "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps." *Brand X*, 125 S.Ct. at 2700.

[35/] The EEOC's regulation can also be understood as filling several distinct gaps in the ADEA in different ways. *Erie County* addressed at least two potential ambiguities in the statute: (1) whether the ADEA applies to retiree benefits at all, *see* 220 F.3d at 208-09, and (2) whether Congress nonetheless intended to allow employers to coordinate retiree health benefits with Medicare without meeting the "equal benefit or equal cost" safe harbor, *see id.* at 213-14. The EEOC's exemption has the effect of answering "yes" to both questions.

Chevron commands a reviewing court to inquire whether there is a gap in the statute; if so, then the agency is entitled to regulate in any reasonable manner within that gap. *See Chen*, 381 F.3d at 224 (characterizing *Chevron* step two as test of regulation's "reasonableness"). Here, there is a gap in section 4(a)(1), which the EEOC has chosen to fill by interpreting the section to apply to retiree benefits generally, while carving out an exception for health benefits under its section 9 authority. Because this combination of sections 4 and 9 is a reasonable way for the EEOC to fill the statutory gap, it passes the second step of the *Chevron* test.[36/]

F. Whether the Regulation is "Arbitrary and Capricious"

Having concluded that the EEOC's regulation passes the two-part test of *Chevron*, I am bound to uphold it unless it is otherwise "arbitrary and capricious" under section 706(2) of the APA. *See Pfenning*, 541 U.S. at 239, 124 S.Ct. 1741; *Chen*, 381 F.3d at 224; *see also Brand X*, 125 S.Ct. at 2710-12 (rejecting argument that regulation was arbitrary and capricious after finding that it satisfied two-step *Chevron* test). The traditional "arbitrary and capricious" standard under the APA asks "whether [the agency] considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 111 (3d Cir. 1997). The scope of review is "narrow, and a court is not to substitute its judgment for that of the agency." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389 (3d Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n of*

[36/] I also find that the regulation at issue falls within the EEOC's discretion to make exemptions to the ADEA as "necessary and proper in the public interest" within the meaning of 29 U.S.C. § 628.

U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). The AARP has put forth several arguments as to why the regulation cannot meet this admittedly "highly deferential standard," *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1216 (3d Cir. 1992), all of which I find insufficient as a matter or law.

The AARP first claims that the EEOC failed to "conside[r] the relevant factors" in promulgating the exemption at issue, *Growth Alliance*, 121 F.3d at 111, but this allegation is without support in the record. It is clear that the EEOC consulted numerous sources and assembled a copious amount of data before promulgating the regulation at issue. Before publishing its Notice of Proposed Rulemaking ("NPRM") in the Federal Register, the EEOC gathered information on retiree health benefits from unions, private employers, employee groups, actuaries, benefits consultants, human resources consultants, and state and local government representatives. 68 Fed. Reg. at 41542. The EEOC also examined a study by the General Accounting Office ("GAO"), reviewed survey data and scholarly publications on retiree health benefits,[37] and held meetings with various stakeholders.[38] *Id.*

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[37] The administrative record include several hundred pages of studies and articles that were consulted by the EEOC and cited in its NPRM, (ADR08120-ADR08125, ADR08174-ADR08362, ADR08372-ADR08527, ADR08561-ADR08565, and ADR09746-09749), and still more that were reviewed but not cited (ADR0863-ADR08371, ADR08538-ADR08561, ADR08566-ADR09031, ADR09034-ADR09042, and ADR09741-ADR09745).

[38] These stakeholders consisted of, *inter alia*, labor unions, industry groups, and advocacy groups, and included the AARP. (*See* ADR08022 (list of stakeholder meetings); ADR08008-AD08013 (sign-in sheets)).

The data indicated to the EEOC that a declining number of employers were providing health benefits to retirees, *id.* at 41544, and that "concern about the potential application of the ADEA to employer-sponsored retiree benefits [was] adversely affecting the continued provision of this important benefit." *Id.* at 41542. The GAO report, which was submitted to the Senate Committee on Health, Education, Labor and Pensions in May 2001, expressed concern that the EEOC's enforcement of *Erie County* "could potentially accelerate the decline of retiree health benefits." U.S. General Accounting Office, *Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion* (GAO Doc. No. GAO-01-374), at 16 (2001) (ADR07746). The report indicated that employers might seek to comply with the ADEA by eliminating or "reducing benefits to the lowest common level for all retirees." *Id.* at 17 (ADR07747). Another study agreed that in response to EEOC enforcement of *Erie County*, employers might eliminate many retiree medical programs altogether." Anna M. Rappaport, "FAS 106 and Strategies for Managing Retiree Health Benefits," *in Compensation and Benefits Management,* Spring 2001, at 38 (ADR08141); *see also* Paul Frontsin, "Retiree Health Benefits: Trends and Outlook," *in EBRI Issue Brief No. 236*, Aug. 2001, at 14 (ADR07979).

On the basis of its research, the EEOC concluded that the public interest would best be served by a narrow exemption from the ADEA for Medicare coordination of retiree health benefits. *See* Age Discrimination in Employment Act Regulation for Retiree Health Benefits, Final Rule approved by Commission, Apr. 22, 2004, at 2 ("Final Rule") (ADR09723). The EEOC examined various alternatives to the exemption it ultimately proposed and found them unworkable. *See* 68 Fed. Reg. at 41546. After publishing its proposed exemption for notice and comment, the EEOC received numerous comments in favor of the exemption from employers who either

already had or would soon need to reduce retiree health benefits in order to comply with the ADEA. (Comments of Minnesota Sch. Bd. Ass'n, at 2, ADR07219; Comments of Nat'l Rural Elec. Coop. Ass'n, at 2, ADR07233; Comments of Wisconsin Ass'n of Sch. Bds., at 2, ADR07257; Comments of Burke, William & Sorenson LLP, at 2, ADR07174.) At the end of the notice-and-comment period, after considering all the data available, the EEOC voted to approve the regulation at issue. (Notation Voting Record, ADR09307.) The EEOC's in-depth study of retiree health benefits, as well as its consideration of various viewpoints in the stakeholder meetings, demonstrate that the EEOC "considered the relevant factors" before promulgating the regulation at issue. *Growth Alliance*, 121 F.3d at 111.

Furthermore, the EEOC "articulated a rational connection between the facts found and the choice made." *Id.* The information and comments received by the EEOC indicated that "concern about the potential application of the [ADEA] . . . to employer-sponsored retiree health benefits . . . has adversely affected the availability of this benefit." Final Rule, at 2, (ADR09723). The asserted purpose of the regulation at issue is to "ensure that he application of the ADEA does not discourage employers from providing health benefits to their retirees." 68 Fed. Reg. at 41542. Thus, there is a rational connection between the information on which the EEOC relied and the regulation it ultimately passed. Under the arbitrary and capricious standard, "if a reasonable person could rely on the agency's studies to reach its conclusions, the conclusions are not arbitrary," *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842 854 (3d Cir. 1999), and the EEOC has more than met this standard.

The AARP also claims that the regulation is arbitrary and capricious because the EEOC has no special competence to make healthcare policy. (Pls.' Mem. Supp. Mot. Prelim. Inj. at 10, 25-27.) However,

because the question that the EEOC's regulation addresses—i.e., which employee benefits are covered by the ADEA—is surely within the agency's purview, it is irrelevant that the regulation may have consequences for the provision of healthcare generally. Indeed, it is a rare agency regulation that does not have some consequences in fields outside of the issuing agency's statutory mandate.

Next, the AARP claims that the EEOC made an arbitrary and capricious policy shift from its position in the *Erie County* amicus brief to the position reflected in the regulation at issue. (Pls.' Reply Supp. Mot. Prelim. Inj. at 11-12.) However, an agency is "free within the limits of reasoned interpretation to change course if it adequately justifies the change." *Brand X*, 125 S.Ct. at 2710. The mere fact that an agency has changed its policy does not render a regulation arbitrary and capricious "so long as [the agency] can justify its change with a 'reasoned analysis.'" *Horn v. Thoratec Corp.*, 376 F.3d 163, 179 (3d Cir. 2004)(citing *State Farm*, 463 U.S. at 42, 103 S.Ct. 2856). Here, the EEOC has acknowledged the position it took in *Erie County*, *see* 68 Fed. Reg. at 41545 n.25, and has given a reasoned explanation for its change. *See id.* at 41546 ("The Commission is concerned that many employers will respond to [*Erie County*] . . . not by incurring additional costs for retiree benefits that supplement Medicare, but rather by reducing or eliminating health coverage for retirees who are not yet eligible for Medicare."). Thus, the EEOC's reasoned change in policy was neither arbitrary nor capricious.

Finally, the AARP claims that in promulgating the exemption at issue, the EEOC failed to follow its own regulations, which require a "strong affirmative showing" that an exemption is "necessary and proper in the public interest" as well as "due regard for the remedial purpose of the [ADEA]" before the agency can exercise its section 9 exemption power. (Pls.' Mem.

Supp. Mot. Prelim. Inj. at 23-25, citing 29 C.F.R. § 1627.15(b).) While an agency is bound to follow its own self-imposed regulatory limitations, *see United States v. Nixon*, 418 U.S. 683, 695-96, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), this particular limitation seems only to require that the agency come to a reasoned decision after considering all the factors. In the absence of any case law interpreting 29 C.F.R. § 1627.15(b), I am left to conclude that it imposes only a slightly higher burden than the arbitrary and capricious standard of 706(2) of the APA. The EEOC has easily passed that low hurdle, and it has also demonstrated "due regard" for the purposes of the ADEA and made the "strong affirmative showing" that the exemption is necessary and proper in the public interest.

In *AARP I*, I found that there were no genuine issues of material fact and that the AARP was entitled to judgment as a matter of law on the question of whether the regulation was "not in accordance with law" under section 706(2) of the APA. *AARP I*, 2005 WL 723991, at *6. Thus, I granted the AARP's motion for summary judgment. *Id.* Summary judgment under Federal Rule of Civil Procedure 56(c) should be granted "if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." *Kornegay v. Cottingham*, 120 F.3d 392, 395 (3d Cir. 1997). Because I now find that defendant EEOC is entitled to judgment as a matter of law, both on the question of whether the regulation is contrary to law and on whether it is arbitrary and capricious, I will vacate my Order granting summary judgment to Plaintiffs and enter summary judgment in favor of Defendant on Count I of Plaintiffs' complaint.

In *AARP I*, I did not allow the EEOC to do with an "exemption" under section 9 of the ADEA what the

Third Circuit's *Erie County* decision foreclosed it from doing by way of regulation. Now, *Brand X* has made it clear that neither *Erie County* nor the plain text of section 4(a)(1) of the ADEA dictate a single permissible interpretation that would foreclose the EEOC from interpreting the ADEA not to apply to *any* retiree benefits. Thus, under *Chevron*, the EEOC could theoretically construe section 4(a)(1) to either include or exclude all retiree benefits. Additionally, under section 9 of the ADEA, the EEOC can forbear from exercising its regulating authority when "necessary and proper in the public interest." Thus, the EEOC is free, under section 4(a)(1), to conclude that the ADEA covers retiree benefits generally, and equally free, under section 9, to exempt the practice of Medicare coordination of retiree health benefits. Because the EEOC's regulation was not otherwise "arbitrary or capricious," it passes the *Chevron* test and is a lawful exercise of the agency's rulemaking authority.

F. *Count II of the AARP's Complaint*

Finally, I reach Count II of the AARP's complaint, which I did not need to reach in *AARP I*. Count II alleges that the regulation at issue was promulgated "based upon comments, input and information that were not available to plaintiffs and others during the notice and comment rulemaking," in violation of 5 U.S.C. § 553. (Pls.' Compl. at 22.) Because there are no genuine issues of material fact with respect to Count II of Plaintiffs' complaint, and Defendant is entitled to judgment as a matter of law, I will deny Plaintiffs' motion for summary judgment on Count II and grant summary judgment in favor of Defendant.

The AARP claims that "*ex parte* communications that directly influenced EEOC action were not disclosed to the plaintiffs during the notice and comment period." (Pls.' Reply Supp. Prelim. Inj. at 15.) Particularly, the AARP claims that the EEOC

failed to adequately respond to the AARP's Freedom of Information Act ("FOIA") request for documents relating to EEOC meetings with stakeholders prior to the issuance of the Notice of Proposed Rulemaking.[39] (*Id.* at 15-16.) However, even viewing the facts in the light most favorable to the Plaintiffs, I find these allegations insufficient as a matter of law. First of all, as the EEOC points out, 5 U.S.C. § 553, which governs the type of informal rulemaking undertaken in this case, does not forbid *ex parte* communications with an agency. *Cf.* 5 U.S.C. § 557(d)(1) (prohibiting *ex parte* communications with agency in the context of *formal* rulemaking). Indeed, courts have recognized that in the informal rulemaking context, "informal contacts between agencies are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977).

Thus, the only question before me is whether the EEOC withheld the information it relied upon in such a way as to "frustrate judicial review or raise serious questions of fairness," and it is clear that the EEOC did neither. To the contrary, the EEOC took the information it had gathered, both from private parties and from publicly available sources, and presented it in the NPRM in such a way as to "fairly apprise interested parties of all significant subjects and issues involved." *Fertilizer Inst. v. Browner*, 163 F.3d 774, 779 (3d Cir. 1998) (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977). It is true that courts have sometimes invalidated regulations where an agency completely withheld

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[39] As noted above, at least one of these stakeholder meetings was in fact attended by representatives of the AARP, and it appears to have been dedicated to discussion of the AARP's concerns. (*See* ADR08022 (list of stakeholder meetings), ADR08039-ADR08046 (notes from "AARP" meeting)).

"critical factual underpinnings for rule making." *Mortgage Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1379 (Fed. Cir. 2000); *see also Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (agency may not "promulgate rules based inadequate data or data that, [to a] *critical degree*, is known only to the agency") (emphasis added). But no case has held that an agency must disclose each and every piece of information that goes into its decision or suffer the invalidation of its rule. *See, e.g., Mortgage Investors*, 220 F.3d at 1380 (upholding regulation despite agency's failure to disclose relevant statistical data).

Ultimately, all of the AARP's claims that the EEOC failed to disclose information are beside the point, as the AARP has failed to show that any prejudice resulted. Notice-and-comment errors do not automatically invalidate a regulation; the party asserting the error must also demonstrate prejudice to its ability to effectively comment on the proposed rule. *See* 5 U.S.C. § 706 (providing that in review of administrative action under the APA, "due account shall be taken of the rule of prejudicial error"); *See First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) ("As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error."). Thus, in order to prevail, the AARP must "indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity." *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (1995) (internal citations omitted). Through discovery in this litigation, the AARP received substantially all of the information it originally sought in its FOIA request and has had ample time to review it. (Third Decl. of Christopher G. Mackaronis ¶¶8-11.) However, the AARP has failed to point to any particular withheld information that was critical to the EEOC's rule and which the AARP was

deprived of the opportunity to refute. Thus, even when the facts are viewed in the light most favorable to the Plaintiffs, any alleged notice-and-comment violation by Defendant constituted harmless error. For this reason and the others above, I will grant summary judgment to Defendant on Count II of the Plaintiff's complaint.

V. CONCLUSION

In light of the Supreme Court's decision in *Brand X*, the EEOC's proposed regulation, 68 Fed. Reg. 41542, is not contrary to law under the APA, 5 U.S.C. § 706(2). Thus, Defendant has raised "a supervening change in governing law that calls into question the correctness" of my prior grant of summary judgment and a permanent injunction to Plaintiffs, *Enigwe*, 320 F.Supp.2d at 308, and which has made it "no longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5). Accordingly, I now vacate my Order of March 30, 2005, which granted summary judgment to Plaintiffs on Count I of their complaint and permanently enjoined Defendant from publishing or otherwise implementing the proposed rule. Because there are no genuine issues of material fact with respect to either Count I or Count II of Plaintiffs' complaint, and Defendant is entitled to judgment as a matter of law, I now grant summary judgment to Defendant on both counts.

Vacating my Order of March 30, 2005 will dissolve the permanent injunction forbidding Defendant from publishing or otherwise implementing the proposed regulation. However, because the parties have already indicated their intention to appeal by appealing my earlier decision, it is appropriate to keep the injunction in effect pending that appeal. Federal Rule of Civil Procedure 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or

grant an injunction, during the pendency of the appeal . . ." Fed. R. Civ. P. 62(c). To obtain a stay pending appeal, a party must generally establish four factors similar to those necessary for a preliminary injunction: (1) that the party is likely to succeed on the merits of the appeal, (2) that unless a stay is granted, it will suffer irreparable injury, (3) that no substantial harm will come to other interested parties, and (4) that a stay will do no harm to the public interest. *See Howes v. Medical Components, Inc.*, 741 F. Supp. 528, 530 (E.D.Pa. 1990). The Plaintiffs originally moved for a preliminary injunction in *AARP I*, but Defendant's stipulation that it would not publish the regulation until after my decision made such an injunction unnecessary. (Order of 2/7/05.) I now credit Plaintiffs' assertions in their request for a preliminary injunction that they will suffer irreparable harm from the publication of the regulation, and that neither the EEOC nor the public will suffer irreparable harm from a slight further delay in publication while the legality of the exemption is finally resolved. (*See* Pls.' Mot. Supp. Prelim. Inj. at 32-43.) As for the likelihood of success on appeal, courts have held that where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." *Providence Journal Co. v. FBI*, 595 F.2d 889, 889 (1st Cir. 1979). Thus, I will stay the portion of my Order vacating the injunction so as to maintain the status quo pending appeal.

ORDER

AND NOW, this 27th day of September, 2005, it is **ORDERED** that:

(1) Defendant's Motion for Relief from Judgment (Doc.#70) is **GRANTED**; and

(2) This Court's Amended Memorandum and Order of March 30, 2005 (Doc. #60) is **VACATED**; however, with respect to this Court's permanent injunction enjoining Defendant from publishing or otherwise implementing the proposed regulation, this Order to Vacate is **STAYED** pending the resolution of any appeal of this case; and

(3) Plaintiff's motion for summary judgment (Doc.#54) is **DENIED** and Defendant's motion for summary judgment (Doc. #53) is **GRANTED**.

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

March 30, 2005

No. 05-CV-509

AARP, et al.,
Plaintiffs,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendant

Christopher G. Mackaronis, Michael J. Schrier, Bell, Boyd & Lloyd PLLC, Laurie A. McCann, AARP Foundation Litigation, Washington, DC, Stephen G. Console, Console Law Offices LLC, Philadelphia, PA, for Plaintiffs

Gillian Flory, Henry A. Azar, Jr., Jennifer R. Rivera, US Department of Justice, Jacqueline Eloine Coleman, U.S. Dept of Justice Civil Division Federal Programs Branch, Washington, DC, Joan K. Garner,

U.S. Attorney's Office, Philadelphia, PA, for Defendant

Douglas L. Greenfield, Bredhoff & Kaiser PLLC, Ann Elizabeth Reesman, Daniel Yager, McGuiness Norris & Williams, Washington, DC, Daniel P. O'Meara, Montgomery McCracken Walker & Rhoads, LLP, Philadelphia PA, for Movants

MEMORANDUM AND ORDER

ANITA B. BRODY, District Judge.

INTRODUCTION

In this case, the AARP seeks to stop the Equal Employment Opportunity Commission (the "EEOC") from putting into effect an exemption.[40/] This exemption allows employers to give retirees 65 or older health benefits that are inferior to the health benefits given to retirees who are younger than 65. The AARP argues that this practice is employment discrimination on the basis of age and is illegal under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, (the ADEA").[41/]

[40/] The parties use the words "rule," "regulation," and "exemption" interchangeably to refer to the challenged exemption. Indeed, the EEOC issued a "Notice of Proposed *Rulemaking*" stating that the EEOC "proposes to amend its *regulations*" with an *"exemption."* 68 Fed. Reg. 41542 (July 14, 2003). Regardless of whether the challenged exemption is labeled a rule, a regulation or an exemption, I must determine whether the agency, the EEOC, has the authority under the ADEA to take the action in question. This determination involves the "agency's construction of the statute which it administers" and, therefore, must be reviewed under the standard set forth in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Because the label of the agency action does not change the necessary analysis, I will also use the words "exemption," "regulation," and "rule" interchangeably to refer to the challenged exemption.

[41/] Currently, it is illegal under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, (the "ADEA") for employers to reduce or terminate retiree health benefits once the retiree becomes eligible for Medicare at age 65 unless the employers can meet the standard for the "equal benefit or equal cost" defense set forth in the statute. The equal benefit or equal

The EEOC argues persuasively that without this exemption, employers will reduce or eliminate health benefits for all retirees, no matter what their age. This is because retiree health benefits are becoming so expensive that employers cannot afford to give the same level of health benefits to all of their retirees. With the EEOC's exemption, employers could afford to offer greater health benefits to its retirees under age 65. Retirees over age 65 are eligible for Medicare and, therefore, have less need for employer-provided health benefits. Representatives from labor unions, the health insurance industry, and employer groups have filed *amici curiae* briefs in support of the EEOC's exemption.

Unfortunately for the EEOC, the Third Circuit Court of Appeals has already ruled that allowing employers to give retirees 65 or older health benefits that are inferior to the health benefits given to retirees who are younger than 65 is illegal under the ADEA. *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000).

Plaintiffs AARP, Jack W. Macmillan, Frank H. Smith, Jr., Frank A. Wheeler, Fred Dochat, Gerald Fowler, and M. Elaine Clay (collectively referred to as the "AARP") bring this suit for declaratory judgment and permanent injunctive relief against defendant EEOC under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, the ADEA, 29 U.S.C. § 621 *et seq.*, Article V of the United States Constitution, and the doctrine of separation of powers.

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cost defense allows employers to coordinate retiree health benefits with Medicare eligibility at age 65 if (1) the total benefits (including benefits from Medicare) received by retirees over 65 is equal to the benefits received by retirees under age 65 or (2) the cost incurred by the employer for health benefits for retirees over age 65 is equal to the cost incurred for retirees under age 65. 29 U.S.C. § 623(f)(2)(B)(i).

The AARP seeks to enjoin implementation of the EEOC's recently approved regulation[42] that would allow employers, without restriction, to reduce or terminate retiree health benefits when the retiree reaches age 65. Jurisdiction is based on the existence of a federal question. I have power to grant the requested relief, declaratory judgment and a permanent injunction, under 5 U.S.C. §§ 702 & 706.

BACKGROUND

Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000), involved litigation over the provisions of the health benefits plan offered by the County of Erie, Pennsylvania, to its employees. Under this plan, the health coverage options for retirees were allegedly reduced once these retirees became Medicare-eligible. The Third Circuit reviewed the applicability of the ADEA, as amended by the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433 (1990), to Erie County's plan. 220 F.3d at 196. Based upon a detailed statutory analysis of the Act, the Third Circuit held that it was clear from the face of the Act that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare. *Id.* at 208-17; Def.'s Opp. Pls.' Mot. Prelim. Inj. at 6; Mem. Supp. Pls' Mot. Prelim. Inj. at 11-12. The Third Circuit concluded that Erie County's policy violated the ADEA unless Erie County met the "equal benefit or equal cost" defense set forth in 29 U.S.C. § 623(f)(2)(B)(i). *Id.*[43]

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[42] For the full text of the approved regulation, see *EEOC Final Rule on ADEA Exemption for Retiree Health Benefits*, Daily Lab. Rep. (BNA) No. 78, at E-1 (April 23, 2004).

[43] Through an *amicus curiae* brief filed in *Erie County*, the EEOC advocated the same position that the Third Circuit ultimately

In October 2000, the EEOC adopted the *Erie Cour* ruling as its national enforcement policy. EEO *Compliance Manual*, Section 3: Employee Benefits, at § 3-IV B (2000). Through its enforcement, the EEOC learned that the *Erie County* rule was having the unintended consequence of discouraging employers from providing any retiree health benefits, which employers are not required by law to provide, so as not to run afoul of the ADEA's nondiscrimination provisions. (Def.'s Opp. Pls' Mot. Prelim. Inj. at 1.) Concerned about the detrimental effect of *Erie County* enforcement on retiree health plans, the EEOC voted unanimously in August 2001 to rescind the retiree health benefits portion of the Compliance Manual to further study and evaluate the position of the agency towards retiree health benefits. 68 Fed. Reg. 41,545 n.25 (July 14, 2003). In examining the enforcement of the *Erie County* rule, the EEOC concluded that the equal benefit or equal cost defense was impracticable when applied to retiree health plans. *Id.* at 41,546.

On July 14, 2003, the EEOC published for notice and comment a proposed rule that would exempt the coordination of retiree health benefit plans with Medicare-eligibility from the prohibitions of the ADEA even if that coordination did not satisfy the equal benefit or equal cost defense. 68 Fed. Reg. 41542 (July 14, 2003). On April 22, 2004, the EEOC approved the final rule containing the following relevant language:

> (b) Exemption. Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health

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adopted. 220 F.3d at 210.

> benefit plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the Act [the ADEA], and in accordance with the procedures provided therein and in § 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit.

EEOC Final Rule on ADEA Exemption for Retiree Health Benefits, Daily Lab. Rep. (BNA) No. 78, at E-1 (April 23, 2004). The approved exemption will take effect upon publication in the Federal Register.

On February 4, 2005, the AARP filed this suit challenging the exemption. At the same time, the AARP also filed a motion for a temporary restraining order and a preliminary injunction. In a hearing held on February 4, 2005, the EEOC agreed not to publish the challenged exemption before April 5, 2005. (Order of February 7, 2005.) On March 18, 2005, I heard oral arguments on the applicability of *Erie County* to the challenged exemption. After oral arguments, it was apparent that neither the AARP nor the EEOC dispute the holding of *Erie County* or the substance of the challenged exemption. (Tr. 3/18/05 at 7, 11; Def.'s Opp. Pls.' Mot. Prelim. Inj. at 6; Mem. Supp. Pls.' Mot. Prelim. Inj. at 11-12.) The EEOC agrees that the challenged exemption addresses the exact same policy that was examined in *Erie County*. (Tr. 3/18/05 at 7; Def.'s Opp. Pls.' Mot. Prelim. Inj. at 21.) The EEOC also concedes that, absent the challenged exemption, the provisions of the ADEA prohibit the practice of reducing or terminating retiree health benefits in accordance with Medicare eligibility. (Tr. 3/18/05 at 11,

15, 23.) With the agreement of both parties, under Federal Rule of Civil Procedure 65(a)(2), the application for a preliminary injunction is advanced as a trial of the action on the merits. (Pls.' Mot. Consolidate; Order of March 16, 2005.)

Currently before me are both parties' motions for summary judgment. Pursuant to Federal Rule of Civil Procedure 56(c), "[s]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." *Kornegay v. Cottingham*, 120 F.3d 392, 395 (3d Cir. 1997). Both parties are in complete agreement on the facts of this case and the instant motions may be resolved as a matter of law. For the reasons set forth below, the AARP's motion is granted and the EEOC's motion is denied.

DISCUSSION

The AARP argues, *inter alia*, that the challenged exemption is contrary to the plain language of the ADEA. (Mem. Supp. Pls.' Mot. Prelim. Inj. at 7.) The EEOC argues that, under § 9 of the ADEA, 29 U.S.C. § 628, it has the power to issue the challenged exemption from the provisions of the ADEA because the exemption is "reasonable" and "necessary and proper in the public interest." (Def.'s Opp. Pls.' Mot. Prelim. Inj. at 20.) For the reasons set forth below, the AARP's argument is correct.

There is a two-step approach to judicial review of agency interpretations of acts of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). First, the reviewing court must determine whether Congress expressed a clear and unambiguous intent in the statute concerning the precise question at issue.

If congressional intent is clear and unambiguous, then that intent is the law and must be given effect. The court proceeds to the second step only "if the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843, 104 S. Ct. 2778. At the second step, the court asks whether the agency's interpretation is based on a "permissible construction" of the statute. *Id. See also Marincas v. Lewis*, 92 F.3d 195, 200 (3d Cir. 1996). In this case I will not reach the second step of *Chevron* because the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue.

In establishing the first-step of *Chevron*, the Supreme Court noted:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, the intention is the law and must be given effect.

467 U.S. at 843 n.9, 104 S. Ct. 2778. Once a court has determined a statute's meaning, the court must adhere to that prior ruling under the doctrine of *stare decisis* and assess an agency's later interpretation of the statute against that settled law. *Neal v. United States*, 516 U.S. 284, 295, 116 S. Ct. 763, 133 L. Ed. 2d 709 (1996); *United States v. Barbosa*, 271 F. 3d 438, 464 (3d Cir. 2001).

In *Erie County*, the Third Circuit analyzed the meaning of the ADEA as applied to Erie County's practice of reducing retiree health benefits when retirees become eligible for Medicare. 220 F.3d 193. The Third Circuit first examined the substantive

provisions of the ADEA. *Id.* at 208-09. Section (4)(a)(1) of the ADEA makes it unlawful for an "employer" to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). The phrase "compensation, terms, conditions, or privileges of employment" is defined to include "all employee benefits." 29 U.S.C. § 630 (*l*). The Third Circuit held that "the *ordinary meaning* of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person received from his or her former employer" and that the "ADEA applies even when retiree benefits are structured discriminatorily after retirement." 220 F.3d at 209-10 (emphasis added). The Third Circuit then determined that Medicare-eligibility is an "age-based criterion" and that Erie County's policy of reducing health care benefits when retirees became eligible for Medicare violated the ADEA unless any of the ADEA's "safe harbors" was applicable. *Id.* at 212-13. Finally, the Third Circuit held in *Erie County* that the statutory provisions requiring employers to meet the equal benefit or equal cost standard applied to employers' practice of coordinating retiree health benefits to Medicare eligibility. *Id.* at 215 ("*Congress intended* [29 U.S.C.] section 623(f)(2)(B)(i) [providing for the equal benefit or equal cost defense] to apply when an employer reduces health benefits based on Medicare eligibility.") (emphasis added). Thus, in *Erie County*, the Third Circuit determined that Congress intended for the ADEA to prohibit the practice of coordinating employer-provided retiree health benefits with Medicare eligibility unless the employer could meet the equal cost or equal benefit defense.

Under the first step of *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43, 104 S. Ct. 2778. As the EEOC

conceded at oral argument (Tr. 3/18/05 at 7, 11, 15, 23), the challenged exemption in this case would exempt from the ADEA the "coordination of retiree health benefits with Medicare or a comparable State health benefit." *EEOC Final Rule on ADEA Exemption for Retiree Health Benefits*, Daily Lab. Rep. (BNA) No. 78, at E-1 (April 23, 2004). If published, this exemption would allow employers to engage in the same behavior prohibited in *Erie County* without having to meet the equal cost or equal benefit defense. Because the Third Circuit held in *Erie County* that Congress intended the ADEA to apply to the exact same behavior that the EEOC would exempt, the EEOC's challenged exemption is contrary to Congressional intent and the plain language of the ADEA. Bound by Third Circuit precedent, I will grant the AARP's motion for summary judgment.

The EEOC does not dispute the holding of *Erie County*, that the plain language of the ADEA prohibits the practice of coordinating retiree benefits Medicare eligibility. (Tr. 3/18/05 at 11; Def.'s Opp. Pls.' Mot. Prelim. Inj. at 21.) Rather, the EEOC argues that under § 9 of the ADEA, 29 U.S.C. § 628, it has the power to exempt otherwise prohibited conduct from the ADEA as long as the exemption is "reasonable" and "necessary and proper in the public interest." (Def.'s Opp. Pls.' Mot. Prelim. Inj. at 19.)[44] Section 9 of the ADEA provides:

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[44] The parties have cited to, and I have found, no case law that directly addresses the scope of the EEOC's power to issue exemptions under section 9 of the ADEA. The EEOC represented at oral argument that it has promulgated an "exemption" under section 9 on only one previous occasion. (Tr. 3/18/05 at 12-3.) This exemption allowed for non-EEOC-supervised waivers of claims under the ADEA. The EEOC's power to issue this exemption was never challenged in court. (*Id.*) Indeed, there is very little case law that even mentions the EEOC's exemption power under section 9 of the ADEA.

> [T]he Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 628.

The EEOC argues that in applying the first step of the *Chevron* analysis to the challenged exemption, the court should focus on the language in section 9 rather than on the substantive provisions of the ADEA. (Def.'s Opp. Pls.' Mot. Prelim. Inj. at 19-20.) The EEOC argues that the plain meaning of the word "exemption" is to excuse from liability certain conduct that would otherwise be prohibited under the ADEA, even if the Third Circuit has expressly held that conduct to be prohibited. (*Id.*) Any other application of the *Chevron* analysis or interpretation of the word "exemption" would require the court to treat that word as surplusage. (*Id.* at 21.) However, the EEOC's line of reasoning in this case is flawed for at least three reasons.

First, as discussed above, the Third Circuit has already decided that Congress intended for the provisions of the ADEA "to apply when an employer reduces health benefits based on Medicare eligibility." *Erie County*, 220 F.3d at 215. Because "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778. An administrative agency, including the EEOC, may not issue regulations, rules or exemptions that go against the intent of Congress. *See, e.g., Marincas*, 92 F.3d 195 (overturning INS regulations establishing different adjudicatory procedures for stowaway asylum applicants and non-stowaway asylum applicants as

contrary to clear Congressional intent); *Quinn v. New York State Electric and Gas Corp.*, 569 F. Supp. 655, 661 (N.D.N.Y. 1983) (finding that the EEOC's exemption of apprenticeship programs from the ADEA to be contrary to the language of the ADEA).[45/]

Second, examining solely the statutory provision that delegates rulemaking authority rather than the ADEA as a whole, the approach the EEOC is advocating, would render meaningless the first step of *Chevron*. Courts applying the first step of *Chevron* look to the substantive provisions of the act in question. *See, e.g., Chevron*, 467 U.S. at 859-62, 104 S. Ct. 2778 (attempting to determine Congressional intent by examining the statutory language defining "stationary source" and "major stationary source" but not examining the statutory language delegating rulemaking authority to the Environmental Protection Agency); *Marincas*, 92 F.3d at 200 (determining Congressional intent from the phrase "irrespective of such alien's status" rather than from the provisions giving the INS authority to establish asylum application procedures). To focus solely on the

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[45/] The court in *Quinn* noted that the EEOC's apprenticeship exemption was in interpretive rule rather than a legislative rule and, therefore, was due less deference. 569 F. Supp. at 660 n.5. The *Quinn* court also noted that the EEOC had the power to issue exemptions under 29 U.S.C. § 628 and that Congress anticipated that exceptions would be carved out of the broad prohibitions of the ADEA. *Id.* at 661. However, "the pertinent question is not whether the EEOC can make exceptions; it is, rather, whether this particular exception, for apprenticeship programs, finds support elsewhere in the language of the Act." *Id.* The challenged exemption in the instant case is a legislative rule rather than an interpretive rule and this is due more deference. *Id.* at 660 n.5. However, legislative rules are still subject to judicial review under the *Chevron* analysis and must be consistent with the intent of Congress. 467 U.S. at 842, 104 S. Ct. 2778.

statutory provision that delegates rulemaking authority would allow every challenged rule and regulation to pass the first step of *Chevron*, regardless of the substantive provisions of the act in question. Therefore, courts must take into account the substantive provisions and prohibitions of the act in issue when reviewing agency action.

Finally, it is possible to interpret the "exemption" power that the EEOC has been given as a real provision rather than surplusage without giving the EEOC the power to legalize practices that directly contravene the intent of Congress. Agencies have broad power to regulate when "Congress has explicitly left a gap for the agency to fill." *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. The EEOC has the power to issue rules, regulations and exemptions within these explicit, or implicit, gaps that Congress left in the ADEA. In the case of the challenged exemption, however, the Third Circuit held that Congress did not allow for ambiguity with regard to the applicability of the ADEA to retiree health benefits.

Alternatively, the EEOC's section 9 exemption power can be interpreted to allow the EEOC to issue exemptions in individual cases. The EEOC itself interpreted the statute in this way when it was contemplating rescinding the exemption of apprenticeship programs from the ADEA. 45 Fed. Reg. 64213 (Sept. 29, 1980) ("The Commission believes that Section 4(f)(1) and Section 9 of the Act [29 U.S.C. § 623(f)(1), 628] provide sufficient flexibility to accommodate those apprenticeship programs which can establish legitimate age limitations, thereby obviating the need for the blanket exception contained in the former interpretation.").[46/] Thus, following the

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[46/] The EEOC cites only one case to support its argument that courts must defer to an administrative agency's exemption power. Def.'s Opp. Pls.' Mot. Summ. J. at 2 (citing *C.K. v. New Jersey*

Third Circuit's precedent in Erie County does not necessarily lead to the conclusion that the word "exemption" is mere surplusage.

The EEOC cited no relevant cases supporting its analysis of this case. On the other hand, the Third Circuit's decision in *Erie County* held that the ADEA prohibits the very practice the EEOC's exemption would allow. Under the first step of Chevron, I am controlled by Congress's intent, as expressed in the plain language of the ADEA and as interpreted by the Third Circuit. Therefore, I must find that the challenged exemption is invalid.

CONCLUSION

For the reasons stated above, the AARP's motion for summary judgment is granted and the EEOC's motion for summary judgment is denied. The challenged regulation, originally published at 68 Fed. Reg. 41542, is contrary to law and violates the clear intent of Congress in passing and amending the

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Dep't of Health and Human Services, 92 F.3d 171 (3d Cir. 1996) (involving the Secretary of Health and Human Services' power to waive individual state programs from the requirements of federal laws governing Aid to Families with Dependent Children programs)). However, *C.K.* does not support the EEOC's argument. First, the relevant statutory language in *C.K.* is significantly more specific than section 9 of the ADEA. The waiver authority in *C.K.* is contained in a provision titled "Demonstration projects" and only allows the agency to waive experimental state programs that promote the objectives of the act. 42 U.S.C. § 1315. Second, the waiver power in *C.K.* allows the agency to issue waivers for particular state programs only. It does not allow the agency to issue a blanket exemption for illegal behavior, which is what the EEOC seeks to do in this case. Rather than supporting the EEOC's argument, *C.K.* provides an example of an administrative agency's "exemption" power being confined to individualized cases and situations.

ADEA, as articulated in *Erie County*, 220 F.3d 193. The EEOC will be permanently enjoined from publishing or otherwise implementing the challenged regulation.

ORDER

AND NOW, this _____day of March, 2005, it is **ORDERED** that:

(1) Plaintiffs' motion for summary judgment (Doc. #54) is **GRANTED** and defendant's motion for summary judgment (Doc. #53) is **DENIED**; and

(2) Defendant EEOC is permanently enjoined from publishing or otherwise implementing the regulation at issue in this case; and

(3) The hearing scheduled for March 31, 2005 is cancelled.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4594

AMERICAN ASSOCIATION OF RETIRED PERSONS; JACK W. MACMILLAN; FRANK H. SMITH, JR.; FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,
Appellants

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-cv-00509
District Judge: The Honorable Anita B. Brody

SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN Circuit Judges, ALDISERT, Senior Circuit Judge and RESTANI, International Trade Judge*

The counseled petition for rehearing in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the

petition for rehearing en banc is hereby **DENIED**. Judge Jordan would have granted rehearing.

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: 21 August 2007

Age Discrimination in Employment Act

29 U.S.C. § 623(a)(1) provides:

(a) Employer practices

It shall be unlawful for an employer –
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual age;

29 U.S.C. § 623(f)(2)(B)(i) provides:

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer; employment agency; or labor organization –

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(B) to observe the terms of a bona fide employee benefit plan –
(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

29 U.S.C. § 628 provides:

Rules and Regulations

In accordance with the provisions of subchapter II of chapter 5 of title 5. United States Code, the

Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter; and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 630 (l) provides:

Definitions

For the purposes of this chapter –

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

Section 1625.10(e) of Title 29 of the Code of Federal Regulations provides:

Benefits provided by the Government.

An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.